TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. [redacted]6

ANN M. HAIRSTON, PLAINTIFF IN ERROR,

vs.

THE DANVILLE AND WESTERN RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

FILED JUNE 17, 1908.

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INDEX.

	Original.	Print.
Petition	1	1
Record from circuit court of Henry county	31	18
Caption	32	18
Petition	33	18
Notice and sheriff's return	36	20
Notice and petition	37	21
Affidavit of publication	40	23
Motion to quash notices	42	23
Demurrer to petition	44	24
Plea	45	25
Answer	47	26
Replication	52	28
Motion to strike replication	54	29
Notice of meeting of board of directors of D. & W. Ry. Co., September 12, 1904	56	30
Meeting of board of directors of D. & W. Ry. Co., September 14, 1904	57	30
Contract of D. & W. Ry. Co. with Rucker & Witten Tobacco Co., December 17, 1904	59	31
Statements of business at Martinsville	65	34
Exhibit A—Letter, Green to Gravely, November 15, 1904	68	35
Exhibit B—Order of dismissal	68	35

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 20, 1906.

	Original.	Print.
Order of April 13, 1905, filing pleadings, &c.	69	38
Order of January 19, 1905, appointing commissioner, &c.	72	37
Instructions offered and refused	75	38
Instructions given by the court	77	38
Bill of exceptions No. 1	78	39
Letter, Green to Gravely, November 15, 1904	78	39
Proposed decree	78	40
Record in former case offered	79	40
Judge's certificate to bill of exceptions	79	40
Bill of exceptions No. 2	80	41
Testimony of Theodore Parker	84	42
J. A. Hall	119	58
George L. Gravely	131	64
R. White Blair	135	66
C. B. Bryant	141	68
P. Rucker	155	75
Judge's certificate to bill of exceptions	171	82
Bill of exceptions No. 3	172	83
Instructions asked by defendant	172	83
Instructions given by the court	173	83
Judge's certificate to bill of exceptions	174	84
Bill of exceptions No. 4	175	84
Testimony of Theodore Parker	175	84
Judge's certificate to bill of exceptions	176	85
Bill of exceptions No. 5	177	85
Testimony of Col. Bryant	177	85
Judge's certificate to bill of exceptions	177	86
Certificate as to oath of commissioners	178	86
Report of commissioners	178	86
Exception to report of commissioners	181	88
Judgment	182	88
Bill of exceptions No. 6	185	90
Testimony of Watt Hairston	185	90
Ben Townes	186	91
White Blair	187	91
C. P. Kearfott	188	91
J. L. English	189	92
Judge's certificate to bill of exceptions	189	92
Stipulation as to use of record in former case	190	92
Clerk's certificate to record	191	93
Map	192	93
Certificate of clerk of supreme court of appeals	193	94
Certificate of president judge of supreme court of appeals	193	94
Petition for writ of error	194	94
Assignment of errors	195	95
Petition for writ of error	197	96
Order allowing writ of error	198	96
Bond on writ of error	199	97
Writ of error	200	98
Clerk's certificate as to copy of writ of error, &c.	201	99
Citation	202	99
Proof of service of citation	203	99
Return to writ of error	204	99

1 In the Supreme Court of Appeals of Virginia.

ANN M. HAIRSTON, Appellant and Defendant Below,
vs.
THE DANVILLE & WESTERN RAILWAY COMPANY,
Appellee and Plaintiff Below.

Upon a Proceeding to Condemn Lands.

To the Honorables the Judges of the Supreme Court of Appeals of Virginia:

Your Petitioner Ann M. Hairston would respectfully show unto your Honors that she is aggrieved by a certain judgment of the Circuit Court for the County of Henry Virginia, entered on the 10th day of April 1905 in a proceeding instituted by the Danville & Western Railway Company, a corporation, for the purpose of condemning the lands of your Petitioner by which judgment the said Circuit Court determined that the Danville & Western Railway Company hereinafter termed the Applicant, had the right to condemn certain lands of your Petitioner, and by which judgment the report of Commissioners appointed in said proceeding was confirmed, and the said Applicant was authorized and empowered to pay to the Clerk of the said Court the sum ascertained by the said Commissioners, and thereupon to be vested with a fee simple interest in and to the lands of your Petitioner so sought to be condemned, which said judgment was suspended for a period of 30 days in which your Petitioner could apply for and receive from your Honors a writ of error and supersedeas, thereto

Statement of the Case.

On the 7th day of December 1904 the plaintiff below filed in the Clerk's Office its petition, a copy of which is found upon page
2 2 of the record, in which it sought to condemn the lands of your Petitioner therein described, and filed with said petition a plat and profile of such lands, and its proposed line of track, a copy of which petition was served upon your petitioner together with the notice and on the first day of the January Term of the said Court, your Petitioner appeared specially in said proceedings and moved the Court to quash the notice and strike out the petition upon grounds filed in writing, which are found upon page 8 of the record, which motion the Court over-ruled and the exception was saved.

Your petitioner presented to the Court her plea in the nature of a plea in abatement to the said proceedings setting up the fact that there was pending in the Supreme Court of Appeals of Virginia another proceeding instituted by said applicant in the County Court of Henry County, Virginia, for the condemnation of other lands belonging to your Petitioner for the same uses and purposes as set forth in the petition in this proceedings filed, which plea duly verified is found upon page 11 of the record, and to which plea the Applicant

interposed no objection as to its propriety, its form or the legal sufficiency of the matters therein alleged, but on the contrary filed a replication thereto, which replication is found upon page 18 of the record and which your Petitioner then and there moved the Court to exclude upon grounds stated in writing and filed by leave of the Court, which motion the Court overruled, and the exception was saved, whereupon the issue was joined upon said replication, and your Petitioner offered her evidence in support of said plea, and the Applicant offered no evidence in defence thereto, and judgment upon the said pleas was given in favor of the Applicant, which judgment your Petitioner moved to have set aside, which motion was overruled and the exception saved, as appears in bill of exception No. 1 found upon page 37 of the record.

Thereupon your petitioner demurred to the said petition
3 upon grounds stated in writing filed by leave of Court, and which are found upon page 10 of the record, which demur-er the Court over-ruled, and the exception saved.

Whereupon your Petitioner filed her answer to the said petition setting up as defence to the said proceedings the several grounds which are chiefly stated as follows:

1st. That the uses for which the Applicant sought to condemn your Petitioner's lands was a private and not a public —.

2nd. That the Applicant was without authority of law to condemn the lands of your Petitioner for the purposes in the said petition expressed.

3rd. That the proposed line of track was not a branch or lafteral line of the said Applicant.

4th. That the said proceedings were instituted by the Applicant without the authority of its Board of Directors properly given.

5th. That the Applicant had previously instituted proceedings to condemn other lands of your Petitioner for the same purposes which said former proceedings were decided in favor of the Applicant, and were then pending in the Supreme Court of Appeals of Virginia.

6th. That the said Applicant was without the right as in its petition alleged, to abate any damages resulting to the adjacent lands of your Petitioner from such proposed condemnation, by any alleged peculiar benefits which might arise therefrom; which answer duly verified is found upon page 13 of the record.

Issue was joined upon the said answer, and the evidence taken on the issue so raised is found in your Petitioner's bill of exception No. 2 on page 39 of the record, and upon consideration thereof the Circuit Court appointed five (5) Commissioners to ascertain the damages which would result to your Petitioner from the proposed
4 condemnation, to which action of the Court in making such appointment, your petitioner excepted.

Whereupon your Petitioner moved the Court to give certain instructions to the Commissioners which motion the Court over-ruled, but in lieu thereof gave certain other instructions which are found in bill of exception No. 3 on page 130 of the record, to which ruling of the Court the defendant excepted.

Thereafter on the 28th day of January 1905 the said Commission-

ers met upon the premises in question and made to the Court their report which is found upon page 136 of the record by which they ascertained that a just compensation for the lands proposed to be taken was the sum of $650.00, that the damages to the adjacent lands of the petitioner was the sum of $200.00, and that the peculiar benefits thereto was the sum of $2,000.00.

At the April Term 1905 of the said Court the Applicant moved the Court for a confirmation of said report and your Petitioner opposed said motion and in opposition thereto produced certain evidence in reply to which the Applicant produced certain other evidence which evidence is found on page- 143 to 145 of the record, whereupon the Court confirmed the said report and gave leave to the plaintiff below to pay to the Clerk of the Court the sum of $650.00, and thereupon to be vested with a fee simple interest in and to the lands in question, to which ruling of the Court the defendant excepted, as appears from the order found on page 140 of the record.

Assignments of Error.

1st. The Court erred in over-ruling the motion of your Petitioner to quash the notice and petition.

2nd. The Court erred in not excluding the replication of the Applicant to your Petitioner's special plea.

3rd. The Court erred in giving the judgment upon the said plea in favor of the Applicant, and in not giving judgment thereon in favor of the petitioner.

4th. The Court erred in over-ruling the demur-er of your Petitioner to the petition of the Applicant.

5th. The Court erred in permitting the following evidence to be introduced on the issue raised by the petition and answer. See Bills of Exceptions Nos. 4 & 5.

6th. The Court erred in ascertaining that the Applicant had the right to condemn the lands of your petitioner, and in appointing the Commissioners in this proceedings.

7th. The Court erred in refusing the instructions asked for by your petitioner to be given to said Commissioners and in giving in lieu thereof other instructions.

8th. The Court erred in over-ruling the exceptions of your Petitioner to the report of the said Commissioners, and in approving the same and in not giving judgment for your Petitioner on the entire proceedings, according to a motion then and there made.

The same questions were in substance raised by the demur-er as were raised by the motion to quash, and this includes the question raised by the plea, hence we will for convenience consider them under the three several propositions:

1st. The petition was not properly verified.

2nd. The petition was not sufficiently explicit.

3rd. That the pendancy of the former proceedings was a sufficient defence to the prosecution of this proceedings.

1st. The petition was not properly verified.

(*a*) No venure appears. (*b*) The affidavit is not signed by the

affiant. (*c*) It does not show the authority or capacity of the attesting officer. (*d*) It has no jurat attached. (*e*) It fails to show that the affiant states the matters therein contained and required
6 by law to be verified upon his own knowledge to be *facts*, but concludes upon information and belief. For the affidavit see page 4 of the record, and the case of Clowser *vs.* Hall 80 Va. 864 and Cosnor *vs.* Smith (W. Va.) 15 S. E. 977.

2. The petition was not sufficiently explicit, in that it does not contain and set forth "the *material facts* upon which the application is based." Code 1904 1105 F. 4.

The exercise of the right of Eminent Domain being in derrogation of the right of private property must be exercised in strict compliance with the statute. Mars *vs.* Gallagher 9 G. page 94. Alexander *vs.* Alexander 75 Va. 790. Richmond R. R. Co. *vs.* Knappfs 86 Va. 981. Painter *vs.* St. Clair 98 Va. page 85.

Subdivision 4 Paragraph 1105 F Code 1904 requires that the petition shall state that the lands sought to be condemned is needed for the uses and purposes of the Company, and that such petition should be verified, which is analogous to that provision of the Code relating to attachments, wherein it requires that the things therein set out shall appear in the affidavit, and according to the ruling in Clowser *vs.* Hall 80 Va. 864 a statement of the truth of such allegation upon information and belief is not sufficient, and in this case the affidavit concludes upon information and belief.

The West Virginia attachment statute requires that the affiant should state the *material facts* upon which he relies for the attachment, which it will be seen is the same expression as used in the section above cited: that is the *material facts* must be stated. And it was held in the case of Dellaplain *vs.* Armstrong 21 W. Va. 214 that this provision required that the affidavit should contain Evidentiary facts and not *ultimate facts* or conclusions.
7 That the affidavit should furnish facts upon which the conclusion of the Court should be drawn as to the right to the attachment, and not the conclusion of the Petitioner or the affiant, as was stated by the Supreme Court of West Virginia. The right of the plaintiff below to condemn the lands of your Petitioner must be predicated upon a necessity for the taking of such lands for public uses. Whether or not certain uses constitute a public use is a judicial question. See Fallsburg *vs.* Alexander 101 Va. page 95. Hence the allegations of such neceeeity is an allegation of a conclusion of law, and when the statute requires that a party seeking to condemn lands should state the *material facts* upon which it relied, it was the intention of the Legislature to require that such petition should set forth a state of facts from which the Court could upon a demurrer, admitting the truth of the allegations, say, as a conclusion of law, that the uses and purposes to which such land was to be put was in fact a public use. Hence an allegation that such land was needed for the purposes of the Railroad Company was but a conclusion of law and does not measure up to the requirements of the statute which demands as was said by the Supreme Court of West Virginia, not the conclusions of the petitioner but statements suf-

ficient to justify the conclusions of the Court. It is true that the mere fact that a private purpose will be subserved at the same time as a public purpose will not defeat a condemnation proceeding but we believe no court -as ever held contrary to the proposition that where the petition or proceedings upon their face show a prospective private use, and no public use at all then the inference will be drawn that the condemnation is unwarranted in that the object is the taking of private property for private purposes. See Lewis on Eminent Domain Section 353. "The necessity for condem-
8 nation must be obvious." Forkridge Baptist Cemetery *vs.* Redd 10 S. E. 405. In the case of the Association *vs.* Beecher 53 Conn. 551 5th Atlantic 353 the Court says:

"The complainant alleges that the plaintiff is an association duly organized under the laws of this State for the purpose of establishing a burying ground: that it now owns one: that it desires to enlarge it, and that such enlargement is necessary and proper. There is no allegation that the land which it desires to take for such enlargement is for the public use in the sense indicated in this opinion. The argumeent is that as it is a public Cemetery Corporation, we are to understand that the public's use and need exist. That is merely inference or argumentative conclusion and pleading should not be argumentative."

In the petition filed by the Applicant there is little, if anything aside from the conclusion of the Petitioner, to show that the proposed land was needed for a public use. On the contrary it shows upon its face that the objects of the proceedings was for the benefit of the Rucker, Witten Tobacco Company, that the railroad might reach its factory, and there is nothing in the said petition which shows affirmatively that the general public would be in any wise benefited by the construction of such line. What are the facts in this case and what conclusions can be drawn from the evidence will be discussed further on in this petition, but, however, much the allegations of the petition may show, if they do show, that the town of Martinsville is in need of better railroad facilities, there is nothing therein to show that the public needs *will be satisfied*, and until the petitioner has complied with the requirements of the statute and set forth those *material facts* from which the Court will draw the legal conclusion that such public needs exist and *will be* subserved by the proposed condemnation, the plaintiff below has no standing in Court and no legal right to require of the defendant in that Court, who is your petitioner, that she further answer or defend the said proceedings.

9 The Statute Section 1105 F-4 requires that the petition shall show the material facts upon which the application for the appointment of the commissioners is based, or in other words upon which *the right to condemn* is based.

Merely a public need will not justify a condemnation, the taking must be *pursuant* to such need, and there must be alleged a present purpose to appropriate the property so taken to the supplying of such needs.

"The application should certainly aver that the land was needed

for the public use in the burial of the dead *and that it would be,* when condemned *devoted to the public use* in the burial of the dead." Folk Ridge Ass'n *vs.* Redd 10 S. E. 406, also Assoc. *vs.* Beecher 53 Conn. 551 5th Atl. 353.

"The petition should also allege that the Petitioner intends in good faith to complete the improvement for which the land is appropriated and to operate it when completed." 15 Cyc. page 853.

It is not mere laxity of pleading which is here complained of. The objection was predicated upon the necessity of a showing of such intent and purpose, which it was believed could not be shown, and this belief was justified. Your petitioner had the right to require that the Applicant allege what it was necessary to prove— It was error to deny this right because had the Applicant intended to prove this essential fact it could have amended. The prejudice to your petitioner lies further than the denial of a technical right—it put her to defend an insufficient case on the Applicant's parts. The evidence will show that the Applicant if it had amended—could not have sustained the amendment.

3rd. The Pendancy of the Former Proceedings was a Sufficient Defence to the Prosecution of this Proceedings.

This question was raised in the trial Court by motion, demur-er and plea and the fact was not denied that both proceedings were for the condemnation of land belonging to your petitioner for the same uses and purposes, a matter which was of record in the trial Court and which was brought to its attention by the special plea. The legal sufficiency of this fact as a defence to the proceedings was not questioned but on the contrary all objection thereto was waived by failing to demur to or otherwise object to the said plea. But even if it could be questioned in the Appellate Court it seems a well established rule that a former action pending between the same parties involving the same rights is a sufficient defence to the subsequent proceedings. A rule which is supported by the case of *Ex Parte* Poughkeepsie Bridge Company decided by the Court of Appeals of New York reported in the 15th North Eastern page 601. In that case the Bridge Company made a location of the approaches to its bridge which it subsequently abandoned making a new location, and in the condemnation proceedings under the new location the Court held that the first location exhausted the power of the Applicant and it could not condemn for the second location. Speaking of the claim of the Bridge Company asserting its right to adopt the second location the Court says on page 604,

"If the claim is well founded it permits the Company to hold suspended over all the property of the City of Poughkeepsie within two miles of the Bridge, for all time, the power of Eminent Domain to be exercised in its discretion. It would certainly be an extraordinary grant of power to a private corporation which would expose a community to the uncertainties attendant upon such a state of the law * * * The Company did comply with the statute, and did file the map and survey locating the Bridge and its approaches. This

we think exhausted its power of choice and the location so made was fixed and could not be changed in the absence of Legislative authority. Citing Canal Co. *vs.* R. R. Co. Paige 323, Mason *v.* R. R. Co. 35 Barber, Morehead *vs.* R. R. Co. 17 Ohio 349, R. R. Co. *vs.* Naylor 2nd Ohio State 235."

In Cyc. Vol. 15 page 577 we find,

"In the absence of express statutory authority a railway Company having once exercised its discretion in the location and construction of its line, has no power to condemn other lands for the purpose of changing or relocating the route. Citing Connecticut, Illinois,
11 Massachusetts, Mississippi, Missouri, New York, New Jersey, Ohio, Pennsylvania and Rhode Island cases."

But for the statute, Code of 1904 1105 F 19, giving to corporations, possessing the power of Eminent Domain, the right to change the location of its lines, this plea would be an absolute and perpetual bar to the condemnation of these lands by the Applicant, and while that statute gives to such Companies a right of re-location it takes away from such company all rights to the lands theretofore acquired for the same purpose, thus restricting the enjoyment of the right of Eminent Domain to the fruit of one exercise of it, and hence the two actions pending at the same time between the same parties are for the exercise of the one sole right which it possessed. Otherwise it would be perfectly competent for the Company to institute two separate proceedings at the same time for the condemnation of two routes between the same objective points, and take its chances upon a successful issue of one of the said proceedings, or if judgment was given for both, to allow to it the right of selection, and thus implead the defendant in two separate actions the fruit of only one of which it could ultimately enjoy.

The applicant denied neither the legal sufficiency of the allegations of the plea nor the facts therein set forth. The state of the pleading resolves itself into an admission by the applicant, 1st, that there was a former action pending for the same purpose as the present action, and, 2nd, that in law this was a sufficient defence to the second action. Testing the situation then by the rules applicable to the plea of Former Action Pending, we find from the case of Archer *vs.* Ward 9 Grat. page — that it is too late to dismiss the
12 former action after the plea has been filed in the subsequent acition and unless the right to institute the second action existed at the date of its institution, the proceedings, therein, getting their life and vitality from that date, when it is established that on that date the right to institue such proceedings did not exist, the well spring of viality and life to the whole proceedings is cut off and they must necessarily wither.

The Applicant sought in this case by the filing of a replication to the plea to remedy the situation, by means of renouncing all claims to the former action, which would be analagous to the dismissal of the former suit after plea filed, which by the rule of Archer *vs.* Ward was no defence to the plea. The right of action did not exist at the date of the institution of the proceedings, such a right cannot be created by the act of the applicant or relate back. New matter cannot

be added to the ground of a complaint or an application for a right in a court of law which matter occurred after the institution of the proceedings. Brown *vs.* Galens Mining Co. 4 Pacific 1014. Bell *vs.* Williams 10 La. 514. Powell *vs.* Allen N. C. 9 S. E. 138.

Even the defence by a plea of *Puis Darien* Continuance is available only to a defendant, and then as a matter of grace only when the party relying thereon is himself without fault. It cannot be said that an act done by a *party Darien* Continuance, which might have been done prior to the institution of the proceedings, but which by the neglect of such party was delayed, can be so pleaded. The Applicant in substance says by the replication, we admit as a matter of law that the former proceedings pending is a defence to this proceed-
13 ings: We admit that it was pending at the date of this proceedings: We could and should have dismissed it but we failed to do so and we ask the Court now to allow us to remedy our mistake. For this reason the replication should have been excluded. For one other reason the replication should have been excluded. Granting the right of the Applicant under the Statute to change its location and granting further its right to make such change after the institution of this proceedings such right could be exercised only by the Board of Directors by whom all corporate acts muct be done. See Code 1904-1105 A-13 and 1105 B-7-

The *Officers* of the Company would have no right to make such relocation if for no other reason, because it would of its own force be a renunciation of the title of the Company to the other lands, and being a corporate act the exercise of the right of Eminent Domain could not by the said Board of Directors be delegated to any of its officers nor could such a right be exercised in Court by the Attorney. The doctrine is well established that a corporation cannot exercise the right of Eminent Domain by the institution of a new proceedings unauthorized by resolution of the Board of Directors. See Pierce on Railroads, page 32.

"Where the taking is by a corporation the governing body of the corporation which is ordinarily the Board of Directors should decline or approve the location by a definite description." Lewis on Eminent Domain, Section 307.

If then the attorney of the Company cannot institute proceedings to condemn land without the authority of the Board of Directors, how can such attorney acting in court give vitality to such proceed-
ings when they could not have originally instituted them.
14 The act of re-location or selection is as much an act of the Company as the original act of location or selection and it was beyond the power of the attorneys in the lower Court to renounce the former proceedings which was tantamount to a re-location of the applicant's line. One other feature of the replication and the one which alone could give it any propriety in this case, was the statement therein that the Attorneys for the Applicant had notified the Attorneys for your Petitioner that they did not expect to claim under the former proceedings and that such notice was given before the institution of this proceedings. If such notice was given it was also an act of selection which could not be exercised by the attorney, and

hence it was not proper in replication. But granting that this was a proper reply to the plea it is submitted that not only has the applicant failed to prove the allegations but it has been silent in the face of the proof by your petitioner that no such notice was give-. Your petitioner after her motion to exclude joined issue upon the replication and offered so much of the former record as was necessary to prove her allegation, to-wit, that this proceedings was for the same purpose as the former proceedings, and this is abundantly shown by the record, she also offered in evidence the letter passing between the Attorneys for the Applicant which was delivered to the Attorney for your Petitioner, and in which no mention was made of any intention to dismiss the proceedings, but on the contrary it was stated therein that no order could be entered therein which was satisfactory to the Attorneys for your Petitioner.

On the last page of the record will be found an agreement
15 by counsel that so much of the record in the former case, now pending in the Supreme Court of Appeals, as is pertinent to any issue in this case should be considered and read as evidence by either party, and reference to the Notice in that case, and to the Petition in this case will readily establish the fact that the two proceedings were for the same purpose. The other evidence offered by your petitioner on the plea was the letter above referred to, found on page 30 of the record, and the order enclosed therewith, which was the order prepared by the attorney for your petitioner and presented to the attorneys for the Applicant for their approval, which is found on the same page.

Therefore the Court erred in giving judgment upon the said plea in favor of the applicant.

The Court erred in ascertaining that the applicant had the right to condemn the lands of your Petitioner and in appointing the Commissioners in this proceeding.

In discussing this assignment of error we will also refer to the fifth assignment of error which relates to the evidence admitted by the Court over the objection of your Petitioner.

In the Petitions for Appeal appearing in the record in the former case the questions of law and fact arising both in that and in this case as to the uses and purposes to which it was proposed to put the land sought to be condemned and as to the legal sufficiency of such uses to support the condemnation proceedings have been so fully and ably discussed by counsel in that case, that we feel that it would be a trespass upon the time of this Court to attempt to go over the same ground. We refer the Court to that portion of the said Petition found on pages 162 to 168 inclusive and in addition thereto to the 15th Vol. of Cyc., page 581.

16 "If the special benefit to be derived from the lands sought to be appropriated is wholly for private persons the use is a private one and is not made a public use by the fact that the public has a theoretical right to it or that the public will receive an incidental or prospective benefit therefrom:" and on page 583,

"Although it has been held that the test of a public use is whether the use will confer any great public benefit or be of any interest or

advantage to the public by the weight of authority it is also essential to constitute a public use that the general public be to some extent entitled to control the property appropriated or to have the right to a fixed and definite use of it not as a mere matter of favor or of permission of the owner but as a matter of right." And on page 590,

"A branch or lateral road, spur or switch track necessary to the proper operation of the main line of a railroad or which may be necessary to connect important industries or even a single industry with the main line or other public high-way, provided however, that the general public has a right to use it, although it may also subserve private interest is a public use for which private property may be taken under the power of Eminent Domain. It is otherwise, however, if the track is intended to subserve private interest alone or is not to connect with some public improvement, railroad or highway, as where it is intended merely to add to the earnings of the main line or to increase its business or where it is constructed and owned by individuals for their own private use."

This as we understand it was the doctrine of the Zircle case page 45 S. E. 802 and this view is especially emphasized by reading a portion of the decision in the case of the St. Louis R. R. Co. *vs.* Petty Ark. 21 L. R. A. 434 which case is cited as the principal authority relied upon in reaching the conclusion expressed in the Zircle case. On page 439 Cockrell, C. J., says,

"A railway cannot exercise the right of Eminent Domain to establish a private shipping station for an individual shipper. If the station is for the exclusive use of a single individual or a *collection of individuals less than* the public, that stamps it as a private use and private property cannot be taken for private use. The fact that the railway business would be increased by the additional private facilities is not enough to make the use public (italics ours). If no use could be made of the said tracks except to subserve the interest of the Coal Company the power to condemn could not be exercised for that purpose."

17 A review of the record in the former proceedings and the questions therein raised will recall to mind that the applicant located its proposed side track from a point on its main line near its depot in the town of Martinsville across the lot of your petitioner to Franklin Street in said town and along the line of Franklin Street for some distance until it reaches the property of the Rucker, Witten Tobacco Company and it was the contention of the applicant that the public would have access to that portion of the track fronting upon said street, but the evidence there disclosed very clearly that such would not be the case for even if the town of Martinsville had permitted the construction of the track in said street, it would have been impracticable if not impossible for the public to have access to the cars standing thereon. This clearly destroyed the contention of the Applicant that one of the purposes of the proposed track was a public use, and becoming uneasy as to the result which might flow from this disclosure, they entered into a new contract with the Rucker Witten Tobacco Company and located a new line; and it is

for us to examine and see whether or not their claim that the new line will be subject to the public use can be substantiated.

The public use must be fixed and definite and beyond the power of the Applicant to destroy.

The contract of December 17, 1904 between the applicant and the Rucker, Witten Tobacco Company found on page 23 of the record very clearly discloses that both parties have absolutely ignored the rights of the public and that such rights were present in their mind only as a subterfuge under which the right of Eminent Domain could be exercised.

Paragraph 2 of said contract on page 24 provides that the purchase price or cost of condemnation of said lands shall be paid by the Tobacco Company.

18 Paragraph three provides that the applicant shall keep the line *open so long as the Tobacco Company shall continue to operate its business.*

Paragraph four on page 25 of the record provides that the Applicant shall have a strip of land 40 feet wide extending from Fontaine Street South to the lands of your petitioner but that portion of the lands North of Fontaine Street shall be accessible to other parties than the Tobacco Company.

Paragraph six on page 26 of the record provides that if the said Tobacco Company should cease to do business for a period of six months the applicant *may cease to operate the said spur or side track and remove its rails and fixtures therefrom, and that in such event the title to the said 40 feet extending from Fontaine Street to the lands of the petitioner shall revert to the Tobacco Company.*

An examination of the map filed with the petition will show that the proposed track begins on the Main line of the Applicant at a point wholly inaccessible to the public. That at such beginning it turns to the right on a 15 degree curve and descends for 350 feet on a 2% grade; that it then runs through the lands of your petitioner on a level grade for a distance of 386 feet to where it enters the lands of the Rucker, Witten Tobacco Company, that the said level grade continues 114 feet on the lands of said Company to station 10 where it descends on a 1 1/2% grade to the factory of the Tobacco Company. Over its entire length the public has no access to it and although the contract speaks of the line going to the North of Fontaine Street no such construction is authorized by the resolution of the Board of Directors nor is any such construction shown upon

19 the map filed with the petition and since the applicant can only condemn for the uses to which its pleadings show that the proposed construction could be put, and since there is nothing in the pleadings the resolution or the exhibits to show an access to any public street it was error on the part of the Court to admit any evidence as to such extension of the line for the reason that your petitioner had no notice or opportunity to meet such evidence.

The record shows that for 880 feet the proposed track passes through the lands of your petitioner then to the lands of the Rucker, Witten Tobacco Company to the site of its factory and that at no

point along said line has the public access to the track except by the consent of your petitioner or the Rucker, Witten Tobacco Company.

Admitting however for the sake of argument that it was proper to show and that it was shown that the line crossed Fontaine Street, and that the public had access to it at that point the evidence will disclose that the proposed line was 1300 feet long, that at some undetermined point Fontaine Street, the location and even the existence of which seems to be very indefinite, crossed this line. It will be seen from the plat then that such crossing must be between station 10 and 11 or South of said Factory, and that the only access that the public could have to the proposed track would be upon the 40 foot right of way obtained from the Rucker, Witten Tobacco Company at such crossing. The profile shows that at Station 11 there was a fill of nearly 10 feet increasing to 25 feet between stations 9 and 10 and at station 9, 20 feet from your Petitioners' line, the fill was 17 feet. Mr. Julian Hall, the engineer of the Company testified on page 84 of the record that the embankment was 14 feet wide on top
20 as a necessary minimum width for the construction, and that where there was a fill that the slope was 1/2 to 1 (see page 86 of the record) with means that for every foot of fill there is an additional width on each side of said embankment of 1 1/2 feet or a total additional width of 3 feet for every foot of fill and hence that at station 11 the fill being 10 feet the width occupied by a 14 foot embankment would be 30 feet pus 14 feet or 44 feet. That at station 9 it would be 14 feet plus 3 times 17, or 71 feet, and at station 10 it would be 14 plus 3 times 15, or 59 feet, hence it would be impossible on the 40 foot of right of way, provided for by the contract with the Rucker, Witten Tobacco Company, to construct an embankment greater than 14 feet wide on top and that such embankment would range from 10 to 25 feet in height and it is along the top of this embankment that the public is supposed to exercise the use which is the primary purpose of this condemnation proceedings, and the only legal authority therefore.

The Applicant has provided for and had in view no facilities which would admit of access to the said road at any point North of the lands of your petitioner and the public certainly has no fixed and definite right on the lands of the Tobacco Company. Mr. Hall further testified that from station 3 to station 8 plus 86, where the proposed track leaves the line of your petitioner, the lines at which he surveyed, as the limits or boundaries of the lands sought to be condemned, was practically the foot of an embankment 14 feet wide on top and that by ordinary construction the applicant could not build an embankment wider than 14 feet and that 9 feet of this was taken up by the cross ties. (See page 84 to 88 of the record.)

And the witness seeks to avoid this inevitable conclusion by
21 saying that by extraordinary construction, such as the building of a retaining wall, the applicant could, upon the land sought to be condemned, provided for a wagon road way but he makes the astounding statement that such road way would be 7 feet in width at one end and gradually increase to 12 at the other, which in his opinion would be sufficient for the extensive use which

is to serve as the sole excuse and justification for this proceedings. A road way 12 feet wide at the lands of the Rucker, Witten Tobacco Company with a blind end inaccessible to the public 7 feet wide, and this made possible only by the construction of an expensive retaining wall, which is not provided in the resolution of the Board of Directors, which is not mentioned in the pleading in this case, which was never mentioned to him by any officer of the Applicant Company which he had no reason to think was ever planned or intended by the Company, and which there is no provision of law to compel the said Company to adopt. It will be seen therefore, that the public users in any part of this track is limited upon the following contingencies; first, the very vague and indefinite location of Fontaine Street, which is the only highway crossing or touching the proposed track; second the gratuitous gift by the Rucker, Witten Tobacco Company of a greater right of way than is provided for in its contract; third, upon the voluntary construction by the applicant of a wagon road way on top of an embankment varying in height from 10 to 25 feet; fourth, upon the correctness of the assumption of Mr. Hall that it was the intention of the officer who employed him to make the survey that an expensive retaining wall
22 should be constructed; fifth that the said officer was authorized to make such supposed or inferred plans; sixth that the Company would voluntarily construct such an expensive retaining wall, and seventh that a roadway 12 feet wide at one end and 7 feet wide at another, open only at one end, would supply the urgent needs of the business situation in the town of Martinsville. We *must* earnestly submit to the Court that the evidence of Mr. Hall reduces to an absurdity the proposition contended for by the Applicant, that the property sought to be taken in this proceedings can be subjected to a *fixed definite and unavoidable user* by the *general public*. If anything further were wanting to disclose the real color of the intent of the Railroad Company we find it in its contract with the Tobacco Company which provides that upon the *sessation* of business by the Tobacco Company for a period of six months the Railroad Company shall have a right to abandon the proposed track, and what is more that upon such abandonment the land to which the public have the only means of access, if they have in fact any access to it, shall revert to the Tobacco Company. Surely the evidence of Mr. Hall together with the terms of this contract make a transparency of the real object and purpose of this proceedings and that the solemn term- of the Resolution of the Board of Directors of the Railroad Company as well as the terms of the Notice and Petition which refer to the necessity for additional terminal facilities, were all employed as a blind over which they might find access to the Courts.

Major Parker the Superintendent of the Railroad Company says on page 47 of the record that he employed a competent engineer to make a location by which he would have 500 feet of level
23 track to which the public would have access by teams. Of this 500 feet the plat shows 386 feet to be on the lands of your petitioner and 114 feet on the lands of the Tobacco Company,

to which no access by the public is provided for. On page 64 of the record the same witness says that it would require not less than 25 and probably 30 feet width of roadway, aside from the width of the track, in order for the public to have access to the cars standing on the track. The testimony of his engineer shows a maximum possible width of 7 to 12 feet. On page 65 he says that there was no resolution of the Directors of the Applicant Company other than that shown and the plats which were included in the resolution filed, and on page 66 the same witness says that *he hoped to arrange for access by the public* to the south end of this track by means of a private alley over which he at present had no right of way. On page 70 he says that the map which he subsequently said was filed with and was a part of the Resolution of the Board of Directors does not show any means of access by the public to the proposed track. On page 74 the question is asked the witness.

"Q. Did you instruct him (the engineer) to locate his line so that over 500 feet of level track you would have room for teams?

A. I did not know at that time there would be 500 feet. The general idea was to get room for the track cars as much as possible.

Q. Did you give him any instructions whatever as to staking out enough line for teams?

A. Not specifically. I simply explained to him that we wanted team track room and at the same time to reach the Rucker & Witten plant.

24 Q. Is it not a fact Major that your instructions to him were to locate a line from the depot to the Rucker, Witten Factory, and stake off land that would be necessary for that line?

A. Those were the instructions in part. Keeping in mind also acquiring track room.

Q. How much room did he advise you he had staked out in order to get sufficient team track along that level track?

A. Well, I do not know that he advised me specifically that he had staked out any but he called my attention to the fact that between stations 5 and 10 the track was entirely level.

On page 84 Mr. Hall states the lines which he has staked out as the limits of the lands sought to be condemned represent the foot of the embankment of a 14 foot fill. And he says in answer to the following questions,

Q. Did not you know Mr. Hall that if it had been intended to construct wider banks then 14 feet you would have staked out a wider right of way on the east side rather than face the necessity of building retaining walls?

A. Well, I know it looks that way but I did not know what orders Major Parker might give *or what his intention might be.*

Q. You had no instructions in reference to detail? And unless you built retaining walls you would be limited to a road bed 14 feet wide within the limits of that survey on the East side?

A. That I cannot say definitely. Approximately it's true.

25 The witness then states that by a 14 foot embankment he means 7 feet on each side of the center of the track or 2½ feet beyond the cross ties. And on page 89,

Q. If you planned for the roadway you must have considered the width of the roadway in making your plans didn't you?

A. Yes—sir.

Q. As an engineer you would not undertake to plan for a roadway without considering its width?

A. Certainly not.

Q. And you did consider it practicable and sufficient for the needs of your Company to allow *you a width of from 7 to 12 feet of roadway, even when that was secured by a retaining wall?*

A. Yes—sir.

Q. About where would Fontaine Street be if it were shown upon this map?

A. I have been told that it goes about 14 (?) plus 70 on that map. *I have never been able to ascertain exactly where Fontaine comes yet except in an approximate way.* That being the case, I did not put it on the map.

The witness is entirely mistaken as to the position of Fontaine Street for in the next question asked he says that 12 plus 70 is right, and it was testified to by another witness that Fontaine Street was South of the new factory, which is shown on the map at about station 12.

Q. Fontaine Street runs practically at right angles at the track at that point?

A. About that so far as I know I never knew just in detail where Fontaine Street was.

26 These questions and answers clearly demonstrate that the widest embankment possible to be constructed on your petitioner's lands as sought to be condemned would give a wagon road way of from 7 to 12 feet in width to which the public could have no access except along the proposed track where it passes over the lands of the Tobacco Company and the profile and evidence shows that this portion of the track is on an embankment of the minimum height of ten feet increasing in one place to 25 feet *and that the Applicant has acquired from the Tobacco Company only ground enough for an embankment 14 feet wide of which 9 feet is requisite for the track* and hence that the Applicant never intended and does not now intend to construct any wider embankment.

It is true that by certain questions to the witness C. B. Bryant asked by the Court a shifting of the track to the east side of the proposed right of way is spoken of as possible, but Col. Bryant further testified that the natural slope of the ground there to the east was steeper than the slope of the embankment and that such construction would carry the foot of the embankment clear passed the bottom of a very deep ravine and far beyond the land sought to be condemned.

Nothing is in evidence to show that such construction is or was ever intended by the Applicant and it would not only require the occupation of lands of your Petitioner not embraced in this proceedings—but goes entirely outside of the plan as adopted by the Directors of the Applicant and such conjectures could not possibly give justification to this proceedings.

Whether or not the uses to which this land is to be put are public

or private is certainly measured by the possible use of the land sought to be condemned and not the chimerical possibilities suggesting themselves to a witness who is without authority to speak for the Applicant.

We respectfully submit that the evidence shows that the objective and only possible use of the proposed condemnation is purely
27 a private use and hence that the Court should not have appointed the Commissioners herein or confirmed their report.

If a condemnation is warranted under the circumstances as shown by the evidence in this case by reason of the provisions of the Statute of Virginia such statute is clearly unconstitutional in that it deprives your petitioner of her property without due process of law.

If a statute requires that the petition should show the material facts which constitute a public use as the basis of the condemnation proceedings then the said Petition was defective and the demurrer should have been sustained.

If the said statute does not so require but permits the Applicant to show prospective uses and purposes not therein alleged and not required to be alleged then the defendant or the owner of the lands is impleaded in a cause where such defendant is without opportunity or information upon which to base her defence or to meet such evidence, and this is not due process of law.

If the statute neither requires the pleading of such facts as constitute a public use, nor the proof of them, then it deprives the owner of the property of her right to a judicial determination as to whether the proposed uses are public or private and delegates to the Applicant a purely judicial power and such statute is unconstitutional in that it deprives such owner of due process of law.

The court erred in confirming the report of the said Commissioners and in over-ruling the exceptions of your petitioner thereto.

28 The Applicant on the issue raised by the exceptions to the report called as a witness Mr. White Blair who testified that the one lot shown on the plat as adjacent to the Alliance Ware-house and belonging to your Petitioner would if at its rear access were had to a track such as now exist- or the Petitioner could easily and cheaply construct across her land the width of the said lot, would be worth the sum of $2500.00 or $3000.00, and that deprived of such access it would be diminished in value one-half or damaged $1250.00 or $1500.00.

The evidence in this case shows the proposed construction for 380 feet to be a track on a descending grade of 2% which Major Parker, the Superintendent of the Applicant testified was a grade too steep on which to stand cars with safety, thus your Petitioner is deprived of access to the present line of the Applicant's road or the opportunity to construct a switch at the rear of her said lot and deducting the 60 feet back of the Alliance Ware House which would itself be damaged your Petitioner is deprived of a minimum value of $1250.00 to each lot of 60 feet in the remaining 320 feet of length or a minimum damage of $6250. according to the evidence of the Applicant. Such lots cannot be used as lots accessible to a Railroad track because the proposed track is on too steep a grade for cars to be stored in safety.

Her lots are diminished in depth by 40 feet and this for a distance of over 600 feet. These lots front on one of the most important streets in Martinsville, as shown by the evidence, and for the 10, 60 foot lots so shortened she is allowed by the Commissioners the sum of $650.00, which is wholly inadequate.

29 *The Court Erred in Holding that the Damage to the Adjacent Property Estimated by the Commissioners at* $200.00 *Could be of by the Peculiar Benefits.*

This question is fully and ably discussed from the point of view of the constitutionality of the Statute in the petition filed in the former case, and will not be advertent to here further then to refer to such petition.

The question of whether or not the uses to which the Applicant proposed to put this property is a public or a private use and the question of the right to abate damages to adjacent property by reason of alleged peculiar benefits are two questions of the most far reaching importance to property owners in Virginia, and arise in practically the same form and in the same manner in this as in the former proceedings. To deny to your Petitioner a writ of error would be in effect to affirm the decision of the trial Court in the former case in as much as it would mean to your Petitioner that should the judgment in the former case be reversed she would be denied the benefits of such reversal in such proceedings and would be to enforce here, against your Petitioner, a rule of law which by the granting of the writ of error in the former case is declared *prima facie* to be unsettled and undetermined, and while we rely with the uttermost confidence upon those assignments of error peculiar to this case, as well as those which are in common to the two cases, we respectfully submit that the mere pendency of the former proceedings in the Supreme Court of this State gives to your Petitioner a right to have the judgment in this reviewed.

Therefore your Petitioner humbly and respectfully prays
30 unto your Honors that she be granted a writ of error and supersedeas to the judgment of the Court herein complained of, and that the same be reviewed and reversed.

(Signed) ANN M. HAIRSTON,
By JOHN W. CARTER AND
HUNT & STAPLES,
Attorneys.

I, Waller R. Staples, an Attorney at law, practicing in the Supreme Court of Appeals of Virginia, do hereby certify that in my opinion the judgment complained of in the foregoing petition is erroneous, and should be reviewed and reversed.

WALLER R. STAPLES.

Dated May 2, 1905.
Received May 3/05.
S. G. W.

Refused

S. G. W.
J. K.
R. H. C.
J. A. BUCHANAN.
GEO. M. HARRISON

31 DANVILLE & WESTERN RAILWAY COMPANY
vs.
ANN M. HAIRSTON.

On Motion to Condemn Land.

32 VIRGINIA:

Pleas before the Circuit Court of Henry County, at the Courthouse thereof, on the 10th day of April, 1905.

DANVILLE & WESTERN RAILWAY COMPANY, Plaintiff,
against
ANN M. HAIRSTON.

On Motion to Condemn Land.

Be it remembered, that on the 7th day of December, 1904, came the plaintiff by its attorney and gave notice against the defendant which with the return thereon together with the petition is in words and figures as follows:

(Over)

33 To the Circuit Court of Henry County, Virginia:

The petition of the Danville & Western Railway Company respectfully represents to the court, that it is a Railway Company duly chartered and organized under the laws of the State of Virginia, authorized by its charter and the laws of this state to condemn land and other property, or an interest or estate therein, for its uses. That it operates its line of Railway from Danville in said State, to Stuart in Patrick County in said State, passing by the town of Martinsville in Henry County, Virginia, in which town said company has a depot and station for the reception and delivery of passengers and freights transported to and from said town; by reason of the growth of said town of Martinsville, and the large increase of the business in said town, said Railway company in order to meet the demands upon it for the transportation and carrying of freight and the accommodation of the public in transacting its business, it is compelled to secure and obtain more land than it at present owns for the constructing and providing additional facilities, and extension of a spur track from its main line to the property of the Rucker & Witten Tobacco Company hereinafter mentioned and Fountain Street in the said town of Martinsville; and to this end it is needful for said Danville & Western Railway Company to secure and have for its uses and purposes the fee simple title in and to a certain lot or parcel of land which Ann M. Hairston, a citizen and resident of Henry County aforesaid, is the tenant of the freehold, which said lot or parcel of land so wanted

for the use and purposes of the said Danville & Western Railway Company is described and bounded as follows:

Beginning at Miss Ann M. Hairston's corner with Henry C. Lester, on the North side of Danville & Western Railway
34 and 78 feet North of the center of its main line near Martinsville depot:

thence South 63° W. 60 feet to a stake (1)
thence North 10° W. 102 feet to a stake (2)
thence North 70° W. 30 feet to a stake (3)
thence North 30° W. 60 feet to a stake (4)
thence North 10° W. 80 feet to a stake (5)
thence North 80° 30′ E. 150 feet to a stake (6)
thence North 11° E. 150 feet to a stake (7)
thence North 8° 30′ E. 137 feet to a stake (8)
thence North 56° 45′ E. 100 feet to a stake (9)
thence South 19° 30′ W. 124 feet to a stake (10)
thence South 8° 30′ W. 108.5 feet to a stake (11)
thence South 12° 15′ W. 194 feet to a stake (12)
thence South 26° 15′ E. 136 feet to a stake (13)
thence South 14° 30′ E. 140 feet to a stake at point of beginning and containing 1.03 acres, more or less, of which said lot or parcel of land a plat of the survey with a profile showing the cuts and fills (there being no trestles or bridges on said land) is herewith filed marked Exhibit A., as required by the statute.

Said petitioner the Danville & Western Railway Company further shows to the court, that its need and want of said lot or parcel of land for the constructing and providing additional facilities, is due not only to the requirements and demands of the public business of the town of Martinsville, but moreover in order that said Railway Company may thereby reach the lot and business of the Rucker & Witten Tobacco Company which said last named company is largely engaged in purchasing, manufacturing and shipping tobacco in large quantities, and can give to said Railway Company a very great and lucrative business in transporting its products of all descriptions, and thus offers special inducements to said Railway Company to provide facilities for the shipments of tobacco and materials used in the manufacture of the same, as well as machinery and other articles in the operation of the business of the said Rucker & Witten Tobacco Company, and the erection of its buildings, etc., but said track
35 or line of said Railway Company so to be constructed to the lot and business of the said Rucker & Witten Tobacco Company is not to be used only for the business and benefit of said Rucker & Witten Tobacco Company, but for the use and benefit of the public generally.

Your petitioner and the said Danville & Western Railway Company further shows unto the court, that it has made every effort to agree with said Ann M. Hairston, the tenant of the free hold of said lot or parcel of land, for the purchase of the same, but has been wholly unable to agree with her upon the price and terms upon which she will sell, and said Company may purchase said lot or parcel of land.

Your said petitioner, the Danville & Western Railway Company, therefore prays, that this Honorable Court may appoint five disinterested freeholders residents of the said County of Henry, any three of whom may act, for the purpose of ascertaining a just compensation for the fee simple in and to said lot or parcel of land and award the damages, if any, resulting to the adjacent or other property of said owner Ann M. Hairston or to the property of any other person, beyond the peculiar benefits that will accrue to said properties. And your petitioner will ever pray, etc.

DANVILLE & WESTERN R'W'Y CO.,
By THEO. PARKER, *Supt.*

BERRYMAN GREEN &
GRAVELY & GRAVELY,
For Petitioner.

This day personally appeared before me in my office as clerk Theo Parker, Superintendent of the Danville & Western Railway Company, and made oath that the facts set forth in the foregoing petition of the said Danville & Western Railway Company are true to the best of his knowledge, information and belief. Given under my hand this 7th day of Decr. 1904.

T. C. MATTHEWS,
Deputy Clerk.

36 To Ann M. Hairston:

Please take notice that the Danville & Western Railway Company will apply to the Circuit Court of Henry County, on the first day of its January term 1905, for the appointment of commissioners to ascertain what will be a just compensation for the fee simple title in and to the lot or parcel of land of which you are tenant of the freehold, described in the petition of said Danville & Western Railway Company now filed in the Clerk's office of the Circuit Court of Henry County, Virginia, pursuant to section 4, of the act of the general assembly of Virginia, entitled an act "Concerning the exercise of eminent domain" approved January 18th, 1904, proposed to be condemned for its uses, as set forth in said petition, a copy of which is hereto annexed, and to award the damages, if any, resulting to your adjacent or other property, or to the property of any other person, beyond the peculiar benefits that will accrue to such properties, respctively, from the construction and operation of said company's works.

DANVILLE & WESTERN RAILWAY
COMPANY,
By COUNSEL.

Executed Dec'r 8th, 1904, by delivering to Ann M. Hairston a copy of the within notice, also a copy of petition referred to in the within.

J. M. DAVIS, *Sheriff.*

37 *Notice.*

To whom it may concern:

Please take notice that the Danville & Western Railway Company will apply to the Circuit Court of Henry County, on the first day of its January term, 1905, for the appointment of commissioners to ascertain what will be a just compensation for the fee simple title in and to the lot or parcel of land of which Ann M. Hairston is tenant of the free-hold described in the petition of said Danville & Western Railway Company now filed in the clerk's office of the Circuit Court of Henry County, Virginia, pursuant to Sec. 4 of the act of the General Assembly of Virginia, entitled an act "concerning the exercise of the power of eminent domain," approved January 18, 1904, proposed to be condemned for its uses, as set forth in said petition, a copy of which is hereto subjoined, and to award damages, if any, resulting to the adjacent or other property of the said Ann M. Hairston, or to the property of any other person, beyond the peculiar benefits that will accrue to such properties, respectively, from the construction and operation of said company's works.

DANVILLE & WESTERN RAILWAY CO.,
By COUNSEL.

To the Circuit Court of Henry County, Virginia:

The petition of the Danville & Western Railway Company respectfully represents to the Court, that it is a railway corporation duly chartered and organized under the laws of the State of Virginia, authorized by its charter and the laws of this State to condemn land and other property, or an interest or estate therein, for its uses. That it operates its line of railway from Danville, in said State, to Stuart, in Patrick county in said State, passing by the town
38 of Martinsville in Henry county, Virginia, in which town said company has a depot and station for the reception and delivery of passengers and freights transported to and from said town; that by reason of the growth of said town of Martinsville, and the large increase of the business in said town, said railway company, in order to meet the demands upon it for the transportation and carrying of freights and the accommodation of the public in transacting its business, is compelled to secure and obtain more land than it at present owns for the constructing and providing additional facilities, and the extension of a spur track from its main line to the property of the Rucker & Witten Tobacco Company hereinafter mentioned and Fontaine street, in the said town of Martinsville, and to this end it is needful for said Danville & Western Railway Company to secure and have for its use and purposes the fee simple title in and to a certain lot or parcel of land, of which Ann M. Hairston, a citizen and resident of Henry county aforesaid, is the tenant of the freehold, which said lot or parcel of land so wanted for the use and purposes of the said Danville & Western Railway Company is described and bounded as follows, namely:

Beginning at Miss Ann M. Hairston's corner with Henry C.

Lester, on the north side of Danville & Western Railway and 78 feet north of the center of its main line near Martinsville depot:

thence south 63° w. 60 ft. to a stake (1)
thence north 10° w. 102 ft. " " (2)
thence north 70° w. 30 " " " (3)
thence north 30° w. 60 " " " (4)
thence north 10° w. 80 " " " (5)
thence north 8° 30′ e. 150 ft. " " (6)
thence north 11° 30′ e. 150 ft. " " (7)
thence north 8° 30′ e. 137 ft. " " (8)
thence north 56° 45′ e. 100 ft. " " (9)
thence south 19° 30′ w. 124 ft. " " (10)
thence south 8° 30′ w. 108 5 " " (11)
thence south 12° 15′ w. 194 " " (12)
thence south 26° 15′ e. 136 " " (13)
thence south 14° 30′ e. 140 ft. to a stake at point of beginning, and containing 1.03 acres, more or less, of which said lot or
39 parcel of land a plat of the survey with a profile showing the cuts and fills (there being no trestles or bridges on said land) is herewith filed marked "Exhibit A.," as required by the statute.

Said petitioner, the Danville & Western Railway Company, further shows to the Court that its need and want of said lot or parcel of land for the constructing and providing additional facilities, is due not only to the requirements and demands of the public business of the town of Martinsville, but moreover in order that said railway company may thereby reach the lot and business of the Rucker & Witten Tobacco Company, which said last named company is largely engaged in purchasing, manufacturing and shipping tobacco in very large quantities, and can give to said Railway Company a very great and lucrative business in transporting its products of all descriptions, and this offers special inducements to said Railway Company to provide facilities for the shipments of tobacco and materials used in the manufacture of same, as well as machinery and other articles used in the operation of the business of the said Rucker & Witten Tobacco Co., and the erection of its buildings, etc.; but said track or line of said Railway Company so to be constructed to the lot and business of the said Rucker & Witten Tobacco Company is not to be used only for the business and benefit of said Rucker & Witten Tobacco Co., but for the use and benefit of the public generally.

Your petitioner, the said Danville & Western Railway Company, further shows unto the Court, that it has made every effort to agree with Ann M. Hairston, the tenant of the freehold of said lot or parcel of land, for the purchase of same, but has been wholly unable to agree with her upon the price and terms upon which she will
40 sell, and said company may purchase said lot or parcel of land.

Your said petitioner, the Danville & Western Railway Company, therefore prays that this Honorable Court may appoint five disinterested freeholders, residents of the said county of Henry, and three of whom may act, for the purpose of ascertaining a just compensa-

tion for the fee simple in and to said lot or parcel of land and award the damages, if any, resulting to the adjacent or other property of said owner Ann M. Hairston, or to the property of any other person, beyond the peculiar benefits that accrue to said properties, and your petitioner will ever pray, etc.

DANVILLE & WESTERN RAILWAY CO.,
By THEO. PARKER, *Sup't.*

BERRYMAN GREEN AND
GRAVELY & GRAVELY,
For Petitioner.

This day personally appeared before me in my office as clerk, Theo. Parker Superintendent of the Danville & Western Railway Company, and made oath that the facts set forth in the foregoing petition of the said Danville & Western Railway Company are true to the best of his knowledge, information, and belief.

Given under my hand this 7th of December, 1904.

T. C. MATTHEWS,
Deputy Clerk.

VIRGINIA, *Henry County, To wit:*

I, A. S. Gravely, editor of Henry Bulletin, a newspaper published at Martinsville, in the county of Henry, do certify that the annexed petition and notice in the case of Danville & Western Railway
41 Company *vs.* Ann M. Hairston, was published once a week for four successive or consecutive weeks in said newspaper, beginning December 9, 1904.

Given under my hand this 7 day of January, 1905.

A. S. GRAVELY, *Editor.*

1905, 9th January filed.

J. H. MATTHEWS, *Clerk.*

42 In the Circuit Court for the County of Henry, Virginia.

THE DANVILLE & WESTERN RAILWAY COMPANY
vs.
ANN M. HAIRSTON.

Upon a Proceeding to Condemn Land.

The defendant Ann M. Hairston by counsel moves the Court to quash the alleged notices herein given, upon the following grounds:—

2nd. The petition filed with and constituting a part of the notices is not properly verefied as required by law.

3rd. The petition attached to and constituting a part of said notice does not sufficiently set up a right in the petitioner to condemn the lands of the defendant.

4th. The said notice aside from the petition attached, is not sufficient in law.

The defendant moves to quash the notice and strike out the petition and exhibit filed herein upon the following grounds:—

1st. That the records of this Court will show that there is in abeyance in this court, pending an appeal to the Supreme Court of Appeals of Virginia, a judgment in favor of the petitioner authorizing it to take the lands of the defendant for the same purposes and uses as in this petition set forth.

2nd. The petitioner having heretofore instituted proceedings in this court to condemn the lands of the defendant for the same uses and purposes, as in this proceeding alleged, the said petitioner cannot institute a second proceedings for the same purpose.

43 3rd. The petitioner having heretofore instituted proceedings in this court for the taking of the defendant's lands for the same uses and purposes, as in this petition alleged, the said petitioner cannot institute this proceeding for the taking of other lands unless the same is pursuant to duly adopted, and ratified change of location and it does not affirmatively appear from said notice or said petition herein that there has been any such change intended, adopted or ratified

1905, January 12th filed.
J. H. MATTHEWS, *Clerk.*

44 In the Circuit Court for the County of Henry, Virginia.

THE DANVILLE & WESTERN RAILWAY COMPANY
vs.
ANN M. HAIRSTON.

The Demurrer of Ann M. Hairston to the Petition Filed Herein.

Not waiving her said motions heretofore filed herein but insisting upon the same the defendant demurs to the petitioner's petition filed herein and says that the same is not sufficient in law and for grounds of *its* said demurrer assigns the following:—

1st. That said petition shows upon its face that one of the objects and purposes for which its proposed track to be located upon the lands herein sought to be condemned is a private use, and the said petition does not sufficiently show that the same is intended for or can be subjected to any public use.

2nd. The allegations in the said petition contained that the lands now sought to be taken are wanted by the petitioner for a public use does not sufficiently state the material facts constituting such intended use as a public use, which is required by law.

3rd. The petition is not properly verified as required by law.

4th. The petitions and exhibits filed therewith are defective and insufficient for reasons to be assigned at bar.

45 In the Circuit Court for the County of Henry, Virginia.

THE DANVILLE & WESTERN RAILWAY COMPANY
vs.
ANN M. HAIRSTON.

This day came the defendant Ann M. Hairston, in her own proper person as well as by her attorney and not waiving any of the defects in the notice and petition herein filed or her right to insist upon a motion to quash the said notice, to quash the said petition, to dismiss the said petition, and her demurrer to the said petition but insisting upon the same, comes and defends the said proceedings and for a plea says:—

That heretofore to-wit on the 14th day of September, 1903 in the County Court for the County of Henry in the State of Virginia, this petitioner instituted certain proceedings seeking to condemn certain lands of the defendant for the same uses and purposes as constitute the object of this proceeding, and that in said former proceeding judgment has been entered in the said County Court in favor of the petitioner granting it the right to condemn and take other lands of the defendant's than these in this proceeding described, for the uses and purposes herein set out, and that said judgment is now suspended by reason of the fact that the matter of law and fact raised by the said former proceeding are now pending in the Supreme Court of Appeals of Virginia, wherefore the petitioner is without the right to condemn either lands for the same uses and purposes, and this she is ready to verify.

Wherefore the defendant prays judgment of the said petition, notice and proceedings herein and prays that the said notice and petition may be quashed and this proceeding dismissed.

46 STATE OF VIRGINIA,
County of Henry, To-wit:

This day personally appeared before me, the undersigned authority, in and for the County and State aforesaid in my said County, Ann M. Hairston who being by me first duly sworn says upon oath that she is the defendant named in the foregoing plea, and that the facts and things therein contained are true.

ANN M. HAIRSTON.

Taken sworn to and subscribed before me this 12 day of January, 1905.

T. G. BURCH,
Notary Public.

1905, January 12, Filed.
J. H. MATTHEWS, *Clerk.*

47 In the Circuit Court for the County of Henry, Virginia.

THE DANVILLE & WESTERN RAILWAY COMPANY
vs.
ANN M. HAIRSTON.

The Answer of Ann M. Hairston to the Petition of the Danville & Western Railway Company.

This respondent not waiving her said motions, demurrer or plea heretofore filed herein for answer to the said petition or so much thereof as the respondent is advised it is proper for her to answer, she says as follows:—

That the said petitioner should not have the relief asked for in its said petition for the reason that the uses and purposes for which the said petitioner seeks to condemn this respondent's land are private uses and not public uses, and that to permit said petitioner to condemn this respondent's lands for uses not public in their nature, is the exercise of a power beyond the authority of the Legislature to delegate to said petition-; that any Legislative enactment whether it be by special charter or general laws attempting to give to the said petitioner power or authority to take the lands of this respondent for such private purposes is null and void; is in violation of the Constitution of the State of Virginia and is in violation of Articles 5 and 14 in addition to and in amendment of the Constitution of the United States.

This respondent is advised and charges that the allegations in the said petition that the lands therein sought to be condemned are needed by said petitioner for public uses is false, and asks that the said petitioner be put to strict proof of its said allegation.

48 This respondent is further advised and charges that the object and purposes of the said proceedings is to take the lands of this petitioner for the construction of a line to the Rucker & Whitten Company's Tobacco Factory, and that such proceedings are instituted after and in pursuant- to an agreement on the part of said petitioner with the said Rucker & Whitten Tobacco Company, whereby the cost of the said condemnation proceedings, the compensation to this respondent for the taking and damaging of her land, and the cost of the construction and completion of the said track is to be paid for in whole or in part by the said Rucker & Whitten Tobacco Company, and that this proceedings is instituted with no view or purpose of constructing a line to which the general public can or shall have the right of access and of use, and this respondent prays that the said defendant Company shall be required to disclose the terms of any such contract with the said Rucker & Witten Tobacco Company or with other parties.

This respondent denies that the petitioner is authorized by law to condemn the lands of this respondent for the purpose and in the manner as set forth in said petition and calls for strict proof of such authority.

This respondent denies that the line of Railway or track for which her lands are sought to be condemned is a breach or latteral line of said petitioner, or that the said petitioner is entitled to condemn such land under any authority vested in it by charter or by general law and calls for strict proof of such right.

This respondent denies that the said proposed line is a breach or latteral or part of the main line or any siding thereof of said
49 petitioner, or that said petitioner is entitled to condemn said land for the purposes and uses to which it is intended to be put and calls for strict proof of such right.

This respondent denies that the construction of the proposed track upon the land sought to be condemned is authorized by the general provisions of law now in force, as set forth in section 7 Paragraph 105 B. of Pollard's Code of Virginia, and calls for strict proof of the same.

This respondent is advised and charges that the said petitioner has heretofore condemned its lawful purpose in the town of Martinsville all of the lands which by law it is entitled to condemn and hence is without right or authority to condemn the lands of the respondent.

This respondent is advised and charges that the said petitioner has heretofore instituted proceedings in the County Court of Henry County for the condemnation of lands of this respondent, other than these described in the said petition for the same uses and purposes for which it now seeks to condemn this respondent's lands, and that said proceedings are now pending in the Supreme Court of Appeals of Virginia, and hence the said petitioner is without authority of law to condemn this respondent's lands as described in said petition.

This respondent is advised and charges that this proceeding is instituted without the authority of the Board of Directors of the said petitioner and that no resolutions of said Board of Directors adopting any change in the former location of its said tracks at this point has been properly adopted or passed and respondent calls for strict proof of any such resolutions.

This respondent is advised and charges that if the said peti-
50 tioner by resolutions of its Board of Directors regularly passed and adopted has authorized a change in the location of said track at said point, and the same is fully and properly proven in this proceedings, then the proceedings heretofore instituted in the County Court of Henry County by said petitioner to condemn other lands of this respondent should be by said petition- abandoned, or that the said petitioner should be required to elect between which of two said proceedings it will prosecute.

This respondent denies the right of the petitioner to abate the just compensation which would have been due to her for the taking or damaging of her property which might be lawfully taken or damaged by any benefit which would accrue from the construction of the proposed line of work, and respondent avers that any statute authorizing such abatement is in violation of the Constitution of Virginia, and the clauses 5 and 14 in addition to and in amendment of the Constitiution of the United States.

This respondent denies that the said petitions and proceedings are legal or that the said petitioner is entitled to conduct the same, and

having answered this respondent prays that she may be hence dismissed with her proper costs in her behalf expended.

ANN M. HAIRSTON,
By Counsel.

51 STATE OF VIRGINIA,
County of Henry, To-wit:

This day personally appeared before me the undersigned authority, in and for the County and State aforesaid, in my said County, Ann M. Hairston, who being by me first duly sworn, says upon oath that she is the defendant named in the foregoing answer, and that the facts and things therein contained are true to the best of her knowledge, information and belief.

ANN M. HAIRSTON.

Taken sworn to and subscribed before me this 12th day of January, 1905.

T. G. BURCH, *N. P.*

1905, January 12th, filed.

J. H. MATTHEWS, *Clerk.*

52 DANVILLE & WESTERN RAILWAY CO.
vs.
ANN M. HAIRSTON.

Replication to Plea of Deft.

And said plaintiff says, that by reason of anything in said plea of the defendant alleged, said plaintiff ought not to be barred or estopped from having and maintaining its said motion herein against said defendant, because said plaintiff says, that said judgment of said County Court of Henry alleged by said defendant to have been entered in favor of said plaintiff in certain proceedings in said Court instituted by said plaintiff to condemn certain lands of the defendant, was an order of said Court entered on the 12th. day of October 1903, confirming the report of certain commissioners theretofore appointed by said Court duly made and returned on the 29th day of September 1903, and on said last named day duly filed, whereby said commissioners ascertained $850.00, as just compensation to said defendant for lands then proposed to be taken by the plaintiff for its uses and purposes. And said plaintiff after return and filing of said report and the said order of the County Court of Henry confirming the same, declined and refused to avail itself of the benefits thereof, and failed and neglected and refused to pay to said defendant or to any one for her or to pay into the court said amount or any part thereof so ascertained and reported by said commissioners in their said report confirmed by the Court aforesaid, of all which said defendant had due notice, and afterwards, to-wit: on the — day of — 1904, said plaintiff by its attorneys assured and informed the attorneys of said defendant that said

plaintiff did not wish, intend or propose to avail itself of said condemnation proceedings and the order confirming the report
53 of the commissioners therein, but had abandoned and relinquished the same, and all claims and rights, if any it had thereunder. And said plaintiff here and now again avers, that it disclaims, abandons and relinquishes wholly and forever any and all rights and claims whatsoever, which may have accrued to said plaintiff by reason of said condemnation proceedings in said County Court of Henry County and the orders of said Court therein, and said plaintiff neither has made, now makes nor will hereafter at any time make any claim to or entry upon said land of said defendant or any part thereof under or by reason of said condemnation proceedings and the orders of said County Court of Henry or any other Court therein.

Said plaintiff further says, that after the condemnation proceedings and orders of the County Court of Henry therein said plaintiff discovered, that it was impracticable to adopt the line of extension of its roadway and track proposed at the time of the institution of said proceedings and denies that the lands of said defendant sought to be condemned by its motion here now before this court are the same lands sought to be condemned in the proceedings heretofore had as alleged by the defendant, to the contrary the plaintiff avers, that the lands now here sought to be condemned are for the most part wholly different lands and are sought to be condemned for another and different line of track and extension, though still for its needs, uses and purposes as a Railway Company and public carrier. And this said plaintiff is ready to verify.

GRAVELY & GRAVELY,
PERRYMAN GREEN,

p. q.

1905, Jan'y T. Filed by leave of Court.
J. H. MATTHEWS, *Clerk.*

54 DANVILLE & WESTERN RAILWAY COMPANY
vs.
ANN M. HAIRSTON.

The defendant moves the Court to strike out and exclude the replication of the petitioner offered herein to the plea of this defendant heretofore filed herein and as grounds of her said motion, says.

1st. That there is no provisions of law applicable to the former proceedings referred to in said plea which required the said petitioner to pay into court or to any person within the time as set forth in said replication the sum therein referred to.

2nd. The rights and status of the parties herein are to be determined as of the date of the institution of this proceeding and the petitioner is without the right by relinquishment of its rights in said former proceedings as of this date to validate these present proceedings.

3rd. The relinquishment therein sought to be made is an abandonment of an interest of said petitioner in real property and can

be effectual only as the corporate act of said petitioner and the said replication does not affirmatively show it to be such.

4th. The allegation in said replication that the lands herein sought to be condemned are different lands from those involved in said former proceedings is not denied by said plea but is affirmed thereby and such allegations are not proper and should be stricken out.

5th. The disclaimer set up and sought to be made in said replication is not available to this defendant in defense to said former proceedings now pending in the Supreme Court of this state.

6th. Said disclaimer, abandonment or relinquishment
55 in said replication contained is by its said term excluded from operation or effect in the Supreme Court of Appeals of Virginia.

1905 January T. Filed by leave of the Court.

J. H. MATTHEWS, *Clerk.*

56 RALEIGH, N. C., *Sept.* 12, 1904.

A meeting of the Board of Directors of the Danville & Western Railway Company is hereby called for twelve o'clock, noon, Wednesday September 14, 1904, in the general offices of the company, Danville, Va.

By order of the President.

H. W. MILLER, *Secretary.*

57 At a meeting of the Board of Directors of the Danville & Western Railway Company, held at the office of the Company in Danville on the 14th day of September, 1904, there were present Mess. James G. Penn, R. A. Schoolfield, Jno. P. Swanson, W. G. Lee and D. W. Spencer and Mr. R. L. Dibbrell and on the motion of Mr. R. L. Dibbrell, Mr. James G. Penn, was called to the chair and Mr. Theo Parker appointed Secretary, thereupon the Chairman explained the object of the meeting to be to authorize the condemnation or acquisition of certain property in the town of Martinsville, Henry County, Virginia, for the purpose of extending the track from or near the depot at Martinsville, Virginia, to the property of the Rucker-Witten Tobacco Company in same town, and laid before the Directors a plot showing the lands necessary to be secured for that purpose.

On the motion of Mr. Jno. P. Swanson, the following resolution was unanimously adopted:

Resolved that the Superintendent of this Company be authorized and directed to apply to Miss Ann M. Hairston for the acquisition by purchase or otherwise of the following land, viz:

Beginning at Miss Ann M. Hairston's corner with Henry C. Lester, on the North side of Danville & Western Ry. and 78 feet north of the center of its main line near Martinsville depot:

Thence S. 63 W. 60 feet to a stake (1)
" N. 10 W. 102 " " " " (2)
" N. 70 W. 30 " " " " (3)
" " 30 W. 60 " " " " (4)
" N. 10 W. 80 " " " " (5)
" N. 8 30 E. 150 feet to a stake (6)
" N. 11 E. 150 " " " " (7)
" N. 8 30 E. 137 " " " " (8)
" N. 56 45 E. 100 " " " " (9)
" S. 19 30 W. 124 " " " " (10)
" S. 8 30 W. 108.5 " " " " (11)
" S. 12 15 W. 194 " " " " (12)
" S. 26 15 E. 136 " " " " (13)
" S. 14 30 E. 140 " " " " at point of beginning and containing 1.03 acres more or less.

58 And in case of failure to agree with Miss Hairston to proceed by proper legal steps to acquire the same by condemnation proceedings under the Statute Law of Virginia.

There being no further business, the meeting, on motion adjourned at 12.35 P. M.

JAMES G. PENN, *Chairman.*

THEO. PARKER, *Secretary.*

59 This contract entered into this 17th day of December 1904, between the Danville & Western Railway Company, a corporation chartered under the laws of the State of Virginia, acting herein by A. B. Andrew, its President, duly authorized thereunto party of the first part, and the Rucker & Witten Tobacco Company, a corporation chartered under the laws of said State, acting herein by Pannill Rucker, its President duly authorized thereunto, party of the second part,

Witnesseth: That whereas the said party of the first part is greatly in need of better facilities for the conduct and handling of its business in the town of Martinsville, Virginia, and to this end desires to secure additional terminal facilities by extending its trackage, sidings etc., in said town; and whereas the said party of the second part intends to erect extensive tobacco manufacturing establishments in said town with a view of enlarging and increasing its business of manufacturing tobacco, and is desirous that the said party of the first part in making said additions to its terminal facilities shall come in touch with the said manufacturing establishments of the said party of the second part:

Now, therefore, in consideration of the premises and of the benefits expected to be derived by the parties hereto respectively, it is mutually covenanted and agreed between them as follows, to-wit:—

1. That the said party of the first part will undertake in the way of procuring larger facilities for the conduct of its business as aforesaid to acquire the right of way in fee simple and build a side or spur track and extend its road bed from its main tracks near its
60 present depot in said town through the lands of the Alliance Warehouse Company and Ann M. Hairston: and thence into

and over the lands of the said party of the second part until the same reaches such point alongside the proposed new main factory to be erected by the said party of the second part as may hereafter be agreed upon between the parties hereto: the location of said extension and spur or side track to be substantially as shown upon the blue print map by Julian A. Hall, Civil Engineer, and annexed hereto as a part hereof. In undertaking to secure the necessary rights for said extension from the said Alliance Warehouse Company and the said Ann M. Hairston, the party of the first part will first undertake to agree with said owners upon a purchase price for the same at a figure satisfactory to the said party of the second part, and in default of such agreement the said party of the first part, will, through its own attorneys and at its own expense so far as lawyers' fees and costs taxed in the legal proceedings are concerned institute and prosecute condemnation proceedings for the acquisition of said rights from said owners. But no liability shall attach to or be incurred by said party of the first part in the event of the failure of its undertaking to secure and acquire said rights of way after due and proper efforts on its part to secure the same as here aforesaid.

2. The said party of the second part, in the event an agreement as aforesaid for the purchase of said rights of way in fee simple for said side or spur track and extension shall pay the amount so agreed upon over to said party of the first part to be used in their acquisition; or in case of condemnation proceedings have to be resorted to, the said party of the second part, shall as soon as it
61 becomes proper and necessary in order to complete the acquisition of the lands sought to be condemned, pay over to the said party of the first part the amount of the damages which may be legally assessed for the taking of the same, which amount the said party of the first part shall use in paying the damages so assessed. While the said party of the second part is to pay the purchase money or the damages for the acquisition of said lands as aforesaid, the title thereto shall be wholly and exclusively vested in the said party of the first part.

3. The said party of the first part, within ninety days after the acquisition of the rights of way aforesaid shall proceed to construct said extension and said side or spur track, the costs of said construction, grading and of the cross-ties necessary for use thereon to be paid in the first instance by the said party of the second part, promptly and regularly as the pay-rolls for the said work becomes due and payable, but the same shall be refunded at the completion of the work on demand by the said party of the first part to the said party of the second part, but without interest. And the said party of the first part shall keep open and maintain said side or spur track and extension so long as the said party of the second part, their successors and assigns shall continue to operate their said tobacco manufacturing establishment.

4. The said party of the first part, in constructing and maintaining said track through the premises of the said party of the second part, shall for the purpose of its business

generally be entitled to a strip of land forty feet
62 wide running from the intersection of said spur or side track on Fontaine Street in Martinsville, Virginia to the intersection of said spur or side track with the land of Ann M. Hairston, said forty feet to embrace the side track itself, and provided further, that if at any point it becomes necessary to fill in, or cut down in order to level up said forty feet in width, the same may be done. And north of said Fontaine Street the said party of the first part shall have the necessary privileges to properly construct and maintain said spur or side track, but the same on the north side of said street shall be used strictly for the accommodation of the party of the second part in its business intercourse with the said party of the first part, unless by consent and permission of said party of the second part said party of the first part shall be allowed to use the same for their business. The said party of the second part will whenever the said party of the first part is ready to begin the construction of the said spur or side track and extensions execute such assurances to carry out the intention of this clause as may be reasonably required by the said party of the first part.

5. The said party of the first part further agrees to transport and carry for the said party of the second part all bricks necessary to be used in the construction of its factories, storehouses &c. from the plant of McCoy & Co., west of Martinsville, near the intersection of the Danville & Western, & Norfolk & Western railroad, on the line of the party of the first part to Martinsville aforesaid, at the rate of thirty cents per thousand brick, provided, however, that the said party of the second part shall load and unload said brick at its own cost and expense, and the said party of the first part
63 shall be at no cost and expense except the carriage of the same.

6. It is understood and agreed between the parties hereto that if the said party of the second part shall abandon the operation of its said tobacco factories, and in evidence thereof shall cease to make actual shipments therefrom, or receive substantial shipments thereto, for the period of six months, the said party of the first part may at its option on ten days' notice in writing to the said party of the second part, its successors or assigns, cease to use and operate said spur or side track and extension or any part thereof, and remove its rails and all fixtures therefrom, but in that event the title of said party of the first part in and to the forty feet of the lands of the said party of the second part shall revert to the said party of the second part and all rights of user and occupancy of the said party of the first part herein granted in respect to said lands of the said party of the second part shall absolutely cease.

7. And the said party of the second part covenants that it will indemnify and hold harmless said party of the first part against all loss or damages resulting unto said party of the first part from the negligence of the servants and employes of the said party of the second part in and about said side track provided such negligence shall occur within the boundaries of the property of the said party of the second part, and will also release and acquit said party of the

first part from all loss and damages from injuries caused by fire or otherwise to the property of the said party of the second part not resulting from the negligence of the said party of the first part.

8. In witness whereof the said parties hereto have caused this agreement to be respectively signed in their names and on
64 their behalf by their respective Presidents, A. B. Andrews and Pannill Rucker thereunto duly authorized and their corporate seals to be hereunto attached, the day and year first above written.

Correct Copy.
D. H. PANNILL, JR.

65 Danville & Western Rwy. Auditor's Office.

Comparative Statement of Business at Martinsville, December.

	Ticket sales.		Freight for'd.		Freight received.	
	1904.	1903.	1904.	1903.	1904.	1903.
Martinsville, Va.	97085	60330	132228	117092	147077	74252
Less Sou. Ry. pro	17225					
	798.60					

Correct,

T. B. COWPER, *Aud.*

Danville, Va., Jan. 17, 1904.

66 Danville & Western Railway Co. Auditor's Office.

Statement of Freight & Passenger Business at Each Station in Nov., 1904 & '03, Compa.

Stations.	Ticket sales.		Freight forwarded.		Freight received.	
	1904.	1903.	1904.	1903.	1904.	1903.
Danville	96445	70530	580454	576489	333066	385274
Bedfords	.....	365	.....	.....	.....	592
Oak Hill	3695	3910	8275	2020	3037	2896
Fitzgerald	1870	3700	947	1884	541	4164
Suay	24015	36865	80601	74445	281467	392183
Leakesville	10200	16285	12943	11622	54658	62531
Cascade	3500	5475	3594	716	6322	4690
Aiken Summit	3055	3335	4890	23856	2759	2713
Boxwood	1340	2150	352	2269	1357	1780
Axton	5905	11100	12221	6298	13064	6206
Bt. Chimneys	3410	6540	5997	31081	2950	5694
Martinsville	72215	61795	124970	122035	179622	94744
Wallers	3230	2585	6848	153	947	1442
Preston	3020	2305	4950	1332	1970	2091
Spencer	7910	13655	8463	26042	8287	11051
Stella	1510	1455	14365	925	3789	1912
Critz	2940	3250	35855	35363	5886	9125
Patrick Spr'g	2395	5235	29348	36045	8212	6852
Stuart	33200	28625	68964	118255	95601	74891
Totals	279855	279160	1003835	1070830	1003835	1070830

Am'y Cond. Col. on tr...	30131	26210
Excess bag collections ..	4315	
Total.....	314301	305370

67 (over)

Less an't tickets sold a/c Sou. Ry. Co.....	17050	
Bal. D. & W. Tky. bill ..	297251	305370

No Agent at Bufords Nov. '04, No. Tkts. sold in a/c other lines No. '03.

Correct.

J. M. FEATHERSTONE, *Audi.*

68 EXHIBIT "A."

DANVILLE, VA., *Nov.* 15, 1904.

George L. Gravely, Esq., Attorney at Law, Martinsville, Va.

DEAR GEORGE: I return herewith the decree offered by Carter, and which I told him I would examine and confer with you and decide whether we would consent to it. I am of the opinion that we cannot consent to any decree that would be satisfactory to the defendant's counsel in the case of the D. & W. R'y Co. *v.* Ann M. Hairston, and I therefore decline, with your consent, to agree to this one. I am greatly of the opinion that the statute settles the rights of the parties and do not see the necessity for any consent decree whatever. Please return the decree to Carter and show him this letter, telling him at the same time that I did not reach Danville in time this morning to write you by return mail. See Sec. 1105, f, Sub. Sec. 27, Page 593, Pollard's Code.

Very truly, BERRYMAN GREEN.

EXHIBIT "B."

In the Circuit Court of Henry County.

DANVILLE & WESTERN RAILWAY CO.
vs.
ANN M. HAIRSTON.

This day came the parties by their attorneys, and by consent of parties by their attorneys, it is ordered that the judgment entered by the County Court of Henry County in the Case of the Dan-
69 ville & Western Railway Company *vs.* Ann M. Hairston be and the same is hereby set aside and with like consent the judgment of the Circuit Court of Henry County refusing to grant a writ of error to the judgment of the County Court aforesaid is hereby set aside and with like consent it is ordered that the application of the Danville & Western Railway Company and the proceedings had thereunder be dismissed at the costs of the applicant.

At a circuit Court continued and held for Henry County at the courthouse thereof on April 13th 1905.

THE DANVILLE AND WESTERN RAILWAY COMPANY
vs.
ANN M. HAIRSTON.

This day came the Danville and Western Railway Company by its attorneys and presented to the Court its petition and exhibits therewith filed in the Clerk's office of this court, December the 7th, 1904, asking for leave to condemn the lands therein described, notice of which said motion, together with a copy of said petition appearing to have been regularly served on the defendant Ann M. Hairston, on December 8th, 1904, and posted and published as required by law, it is ordered that this application be docketed. Whereupon came the defendant Ann M. Hairston by counsel appearing specially and moved the court to quash the notice and petition in this proceedings and tendered in writing the grounds of her said motion, to which ruling of the court the defendant excepted.

Whereupon the said defendant tendered her plea herein which was ordered filed to which said plea said petitioner tendered its special replication in writing, to the filing of which the said defendant
70 objected and moved the court to exclude the same and tendered in writing the grounds of her said motion, which are ordered filed but the court overruled the said motion and ordered the said special replication to be filed to which ruling of the court the defendant excepted; whereupon the said defendant not waiving her objections so filed in writing to the legal sufficiency of said special replication, joined issue thereon and in support of her said plea offered in evidence the printed record of the former proceedings in the supreme court of appeals of Virginia referred to in said plea and by agreement of counsel only so much of said record as is properly relevant to said issue is to be included in the record in this cause, and the defendant further offered a letter dated Nov. 15th 1904, addressed to George L. Gravely, Esq., and signed by Berryman Green counsel for petitioner together with a draft of an order in said letter referred to and marked for identification as Exhibits A. & B., and which are ordered filed with the papers in this cause as evidence on said issue.

And by agreement of counsel the matters thereon arising were submitted to the court, and the court being of the opinion *to* doth enter judgment thereon for the said petitioner, to which ruling and judgment the defendant excepted.

Whereupon the said defendant tendered in writing her demurrer to the said petition which is ordered filed, in which demurrer petitioner joins and the court overruled said demurrer, to which ruling of the court the defendant excepted.

Whereupon the said defendant tendered her answer duly verified, which is ordered filed, to which answer the petitioner replies
71 generally whereupon issue was joined and the matters thereon arising are held for further hearing at a future day of this term.

72 And again At a circuit court continued and held for Henry County, at the Court-house thereof on the 19th day of January 1905.

DANVILLE & WESTERN RAILWAY COMPANY
vs.
ANN M. HAIRSTON.

Motion to Condemn Land.

This day came again the parties by their attorney and the court having fully heard the evidence adduced by both parties on the motion aforesaid and it appearing therefrom that due notice of said motion was served upon said Ann M. Hairston the tenant of the freehold as required by sub-section five of the act entitled an act concerning the exercise of eminent domain approved January 18th, 1904, and also to all persons whom it may concern by publishing said notice once a week for four successive weeks in the Henry Bulletin a newspaper published in the town of Martinsville and County of Henry wherein the land proposed to be condemned is located and posting the same at the front door of the Court house of Henry County on the first day of the rules next preceeding the application as required by law, and the said railway Company has complied with the provisions of Section four of said act, and that the land sought to be condemned is wanted for the uses and purposes of said company, and that no dwelling house of the defendant is within sixty feet of the line proposed to be constructed by said Railway Company through her lands, the said Danville & Western Railway Company is a Railroad and improvement company, authorized by its charter to condemn lands for its uses and that the said Railway Company
73 has been unable to agree with the said Ann M. Hairston the tenant of the freehold of the lands sought to be condemned for the purchase thereof after endeavoring so to agree doth appoint G. B. Dudley, J. D. Sparrow, P. P. Watson, T. G. Burch and S. D. English, five disinterested freeholders of the County of Henry, any three of whom may act, commissioners for the purpose, and doth order said commissioners to meet on the lands in the proceedings described on the 28th day of January, 1905, at 12 o'clock noon, of said day, and ascertain a just compensation for such lands of the defendant Ann M. Hairston proposed to be taken in fee simple by said Danville & Western Railway Company and described in the notice herein aforesaid and award damages if any resulting to the adjacent or other property of said Ann M. Hairston or to the property of any other person beyond the peculiar benefits that will accrue to such properties respectively from the construction and operation of said Company's works, but before executing their duties hereunder the said commissioners shall take the oath provided by section seven of the aforesaid statute of Virginia entitled an act concerning the exercise of eminent domain, to which several findings of the court and its determination and action in appointing said commissioners the defendants excepts, and the said defendant moved the court to strike

out from its instructions in the order contained directing said commissioners to *abode* such damage by the peculiar benefits if any which will accrue to her property which motion the court over-ruled to which the defendant excepted, whereupon the defendant not waiving her said exceptions asked the court to give her three several instructions which were presented and ordered filed herein marked instructions Nos. 1, 2 & 3 "which the court refused to which ruling the defendant excepted. Thereupon the court gave in lieu
74 of said instructions three other instructions ordered filed herein and marked as the court's instructions Nos. 1, 2 & 3 to the giving of which the defendant excepted. And by agreement of counsel the defendant is given 60 days from this date in which to file her several bills of exceptions to the several rulings of the court.

75 The following instructions were offered and refused by the court.

Instruction No. 1 (Refused)

Inasmuch as on the hearing of this motion, the evidence of the petitioner, the Railway Company, tends to show that one of its purposes in condemning the lands of the defendant, is the construction of a driveway along the west side thereof, the commissioners are instructed that in estimating the benefits if any, to the property of the defendant on the west side of said track not taken in said proceedings, they shall not consider any benefits to be derived to said property from the proximity to said proposed track.

Instruction No. 2 (Refused)

The commissioners are instructed that they shall report separately to the Court the three several items (1st) the value of the land of the defendant sought to be condemned; (2nd) the damage to the remaining property resulting from the taking of said proposed area; and (3) the damage to the remaining property from the construction of the proposed track and the roadway therefor.

Instruction No. 3 (Refused)

The commissioners are further instructed that they shall also report their estimate of the value of any of the benefits which will accrue to the remaining property of the defendant by the existence of the said track; but in considering such benefits they shall consider that it is within the power and the probable purpose of the petitioner to isolate the land on the west of the track belonging to the defendant from immediate access to said track, and they
76 shall consider no benefits which this defendant will derive in common with other people and other citizens of the town of Martinsville, but only such benefits as are derived by her exclusive of all other persons.

77 The following instructions were given by the Court.

Instruction No. 1.

The commissioners are instructed that they shall report separately to the court as three several items (1st) the value of the land of the defendant sought to be condemned; (2nd) the damage to the re-

maining property resulting from the taking of said proposed area and the construction thereon of the proposed track and the roadway therefor; (3rd) the value of the peculiar benefits of said remaining property resulting from the construction of the proposed track and the roadway therefor on said area.

Court's Instruction No. 2.

The Court instructs the commissioners further that in determining the peculiar benefits to the remaining property of the defendant from the construction of the proposed work, they may consider that it is within the power and probable purpose of petitioner to establish a roadway for the benefits of the public on the proposed right of way between the track on the same and the land of the defendant on the west side of said right of way.

Court's Instruction No. 3.

The commissioners are further instructed that in estimating the benefits to the remaining lands of the defendant, they are to consider no benefits which said defendant will derive in common with other people and citizens of the town of Martinsville from the construction of the proposed work, but only such benefits as will accrue peculiarly to the remaining property of said defendant as compared with the property of other citizens in said town.

78 In the Circuit Court for the County of Henry, Virginia.

THE DANVILLE & WESTERN RAILWAY COMPANY
vs.
ANN M. HAIRSTON.

Defendant's Bill of Exception No. 1.

Be it known that upon the hearing of this cause and upon the issue raised by the special plea of the defendant and the special replication of the petitioner filed therein and the issue thereon joined, the said defendant in support of said issue, offered in evidence the following letter and decree therein referred to.

DANVILLE, VA., *Nov.* 15, 1904.

George L. Gravely, Att'y-at-law, Martinsville, Va.

DEAR GEORGE: I return herewith the decree forwarded me by Carter and which I told him I would examine and confer with you, and decide whether we would consent to it. I am of the opinion that we cannot consent to any decree that will be satisfactory to defendant's counsel in the case of the Danville & Western Railway Company *vs.* Ann M. Hairston, and I therefore decline with your consent to agree to this one.

I am greatly of the opinion that the statute sets the rights of the parties and do not see the necessity for any consent decree whatever.

Please return the decree to Carter and show him this letter telling him at the same time that I did not reach Danville in time this morning to write him by return mail. See Section 1105 P. Subsection 27 page 293 Pollard's Code.

Very truly, BERRYMAN GREEN.

In the Circuit Court of Henry County.

THE DANVILLE & WESTERN RAILWAY COMPANY
vs.
ANN M. HAIRSTON.

This day came the parties by their attorneys and by consent of parties by their attorneys, it is ordered that the judgment entered by the County Court of Henry County in the cause of the Danville & Western Railway Company *vs.* Ann M. Hairston be and the same is hereby set aside and by like consent the judgment of the Circuit Court of Henry County, refusing to grant a writ of error to the judgment of the County Court of Henry County is hereby set aside and by like consent it is ordered that this application of the Danville & Western Railway Company and the proceedings had therein be dismissed at the cost of the applicant.

79 And the defendant further offered a copy of the printed record in the cause of the Danville & Western Railway Company *vs.* Ann M. Hairston now pending in the Supreme Court of Virginia, and that by agreement of counsel, so much of said record as was desired by either party, and was relevant to the issue so raised, should be considered as evidence offered by said issue.

(Here insert so much of said printed record as requested by either party.) (See agreement of counsel next to last sheet.)

And the Court certifies that this was all of the evidence offered by the defendant upon said issue, and that the plaintiff offered no evidence upon said issue, and the matters of law and fact therein arising having been submitted to the Court, the Court entered judgment on the said plea for the petitioner, the Danville & Western Railway Company, to which ruling of the Court the defendant then and there excepted, and tenders this her bill of exceptions No. 1, and prays that the same may be signed, sealed, saved to her and made a part of the record in this case, which is accordingly done, this 18th day of March 1905.

E. W. SAUNDERS, *Judge.* [SEAL.]

80 In the Circuit Court for the County of Henry, Va.

THE DANVILLE & WESTERN RAILWAY COMPANY
v.
ANN M. HAIRSTON.

Defendant's Bill of Exception No. 2.

Be it known that upon the hearing of this cause, the petitioner in support of its motion for the appointment of commissioners to assess the damage to the defendant's lands in the said petition described, offered the following evidence:

81 In the Circuit Court of Henry County, Virginia.

MARTINSVILLE, VA., *Jan.* 18, 1905.

DANVILLE & WESTERN RAILWAY COMPANY
v.
Miss ANN M. HAIRSTON.

Proceeding for Condemnation of Land Belonging to Miss Ann M. Hairston.

82 In the Circuit Court of Henry County, Virginia.

DANVILLE & WESTERN R'Y CO.
v.
Miss ANN M. HAIRSTON.

Before the Hon. E. W. Saunders, Judge of said Court.

Evidence on Behalf of Petitioner on the Issue Raised by the Petition, the Answer and a General Replication Thereto.

Appearances: for petitioner: Hon. Berrymarr Greene, and George L. Gravely, Esquire. For defendant: Messrs. Hunt & Staples, and T. J. Carter, Esquire.

83 *Index.*

Witness.	Direct-Exam.	X-Exam.
Major Theodore Parker	2	13
J. A. Hall	39	43
Geo. L. Gravely	51	52
R. W. Blair	55	57
C. B. Bryant	61	62
P. Rucker	76	79

84 Maj. THEO. PARKER.

By Judge GREENE:

Q. Where do you reside, Major?

A. Danville, Virginia.

Q. Are you the superintendent of the Danville & Western Railway Company?

A. Yes sir.

Q. Is the paper here shown you the original of the resolution adopted by the board of directors of the Danville & Western Ry. Co., in regard to the condemnation of lands at Martinsville?

A. It is the original of the proceedings of the meeting held in Danville, Va., on September 14, 1904.

Judge GREENE: We will offer this resolution in evidence.

Mr. STAPLES: How many members constitute the board of directors in your company, Major?

WITNESS: They are all on there, I think there is seven,—six or seven.

Q. State to the court whether in accordance with that resolution you applied to Miss Ann M. Hairston for the purchase of the land described in that resolution?

A. I did, sir.

Q. Could you agree with Miss Hairston?

A. I called on Miss Hairston together with Mr. Gravely, and she referred us finally to her nephew in town here, young Mr. Hairston, as her agent. We were unable to agree with him as to the price.

Q. The proceedings now before the court were then instituted in accordance with the resolution, were they?

85 A. Yes sir.

Q. Major Parker, state to the court, if you please, whether the lands sought to be condemned in this proceeding are necessary for the uses and purposes of the Danville & Western Ry. Co. Give us a pretty full statement of the reasons, if you can?

A. The Danville & Western comes into Martinsville on a branch or a spur from the main line, running between Danville and Stewart. This spur leaves the main line about very nearly half a mile east of Martinsville. It comes into Martinsville and ends at Franklin street. The Danville & Western has in the town of Martinsville this main line referred to. The main line proper runs parallel with and about three feet from the platform of the freight and passenger station. Parallel to this track there is another track about 15 feet between the centers of the two tracks, running parallel with and four or five feet from the Alliance warehouse. Both of these tracks are spur tracks, and end at Franklin street. The company also has a freight and passenger station and platform, with a portion of the platform shedded. There is also another track designated Tabernacle track. This track is several hundred feet east of this freight and passenger station referred to, and is parallel with the main line. This track will hold seven box cars, but is quite a heavy grade—about two feet to the hundred feet. There is also parallel with the main

line and also parallel with this Tabernacle track, a spur track which is designated spur track. These are all the tracks that the company has in the town of Martinsville, except a track known as Lester's Siding. This, however, is a private siding, and is fenced in. The gate is as a rule locked, and the company can use for its business only about two box car lengths on the outside of the fence.

86 When I took charge of the road as superintendent on the 10th day of September, 1903, I was very much impressed with the congested condition of things in Martinsville, the danger of operating the yard, and was especially impressed with the lack of team track room; I mean by that, suitable tracks on which solid cars loaded with freight can be placed, such freight to be unloaded by consignees and teams, or *vice versa;* tracks to place empty cars on into which shippers could load freight from their teams. I found only space for three box cars—I mean by that, proper and suitable space. That was the portion of the track described as parallel with the platform, and west of the station building, about three car lengths. Being impressed with the danger of operating this yard, soon after taking charge I gave positive instructions that the track designated as Tabernacle track must never be used for storing cars, and must be kept clear and used only to pass trains. The track was built and intended to pass trains. That is, to sidetrack one train on it, and let the other pass. On account of the increase of business at Martinsville, it has been necessary to change those instructions, and we have been forced to use the Tabernacle track on which to place team track cars, solid cars to be unloaded by consignees. I found also that Mr. J. E. White, who preceded me, had begun condemnation proceedings in order to get better terminal facilities. The track first proposed, led down Franklin street. By building a track down Franklin street, we would be able to stand cars on different points on the street, and thus increase the trackage facilities. Sometime after these proceedings had been commenced, we determined to abandon——

87 Mr. STAPLES: We object to any statement by the witness as to the explanations made by him to the board of directors, or anything that occurred at said meeting, except such matters as are embodied in its duly adopted resolution.

Objection overruled; exception.

A. (Con:) As stated, the superintendent decided not to adopt the track leading down Franklin street, and the reasons for doing so were fully stated to the meeting of the directors on September 14, 1904. The principle reasons for abandoning this track were that it was down one of the principle streets, the business of the town was growing very rapidly, and we anticipated much friction in operating the track on account of having the street blocked, and we feared that as the city grew and business increased, the town council would place such restrictions on the operation of the track as to make it very burdensome to us. There was also great risk of personal injury to persons and teams passing along the street. In order to get out of Franklin street, I selected a lower route, and employed a competent

engineer to lay off and make plans for the most feasible track, to obtain as much team track room as possible, and at the same time, to reach the plant of the Rucker & Witten Tobacco Co. I was informed that this plant would be very greatly enlarged, and in fact, the entire business of this concern would eventually be consolidated at Martinsville. By adopting the route proposed, we would not only reach the plant of the Rucker Witten Tobacco Co. and thereby secure for the Danville & Western a great increase in business, but we would
88 also greatly enlarge our team track facilities. I mean by that, the portion of the track on which loaded cars would be placed to be unloaded by merchants and others in Martinsville doing business here. The map shows that about 500 feet of this proposed track is level; this would be used entirely for the public. This 500 feet would store about 16 or 18 team track cars, and will be used entirely to place cars on for the general public. In addition to that we would reach the Rucker & Witten Tobacco Company's plant, and we would thus be enabled to place cars for that concern immediately at the factory doors, thus relieving the short team track we have in the yard, and also doing away entirely with the danger of using this Tabernacle track as a team track. We can also place empty cars at the Rucker & Witten Tob. Co.'s plant, in which they can load their tobacco shipments. This will also greatly relieve us at the station. This concern has within the last 30 days made in one shipment, 14 solid cars of manufactured tobacco, going to one destination, and all shipped the same day. At present we have team track room for 7 cars on this Tabernacle siding, which I have explained is on a grade of about two feet to the hundred feet, and therefore, very dangerous to operate and to stand cars on. There is room for three cars west of the station building between the station building and Franklin street, and on this same track there is room for five cars to be placed at the platform. These last five cars are as a rule merchandise cars that come here loaded for various consignees, and are unloaded by the station force into the station building. Unloaded freight is placed by shippers on the platform and is loaded into empty cars standing in this same five car space. In order to meet
89 the demands of the business, therefore, it is absolutely necessary to obtain more and better terminal facilities here. We wish to get away from the danger of using this Tabernacle track as a team track as early as possible. The track is on a heavy grade and cars are liable to get loose and roll down the grade. In case one of these cars should happen to get loose just as a train was approaching Martinsville a serious accident would result, the grade is so heavy. Consignees sometimes attempt to move cars a little themselves, and are not able to hold them, and they strike the others on the track, and they have invariably been derailed. We have in the last 60 days had several derailments on this track. I will say, on account of the danger, the east end of the track is protected by a modern safety switch, derailing switch. When the cars strike this switch, they are thrown off the track on the ground. That damages the cars, and damages the track, and causes delay and expense in re-railing them again. To give some idea of the increase of business at

Martinsville, I will state that the Auditor of the Danville and Western Co., made me a statement for November and December, 1904, as compared to same months last year. Outbound or forwarded business in November, 1904——

Mr. STAPLES: Will you file that report with your deposition?

WITNESS: Yes sir.

A. (Con.:) Outbound or forwarded business for November, 1904, as compared with same month 1903, shows an increase of about 16-2/3 per cent. The inbound business for November 1904, compared to same month last year shows an increase of about 89 per cent. The outbound business for December 1904 as compared to same
90 month 1903 shows an increase of about 16-2/3 per cent., and the inbound business for December, 1904, as compared to same month last year, shows an increase of about 100 per cent. So in order to at all handle the business with safety or convenience to patrons, it is absolutely necessary to get more and better terminal facilities. In order to do that, we have located what we think to be the best and most feasible line to accomplish the two objects—get the terminal facilities, and at the same time reach the plant of the Rucker & Witten Tobacco Co.

Q. Major, are you through with your statement?

A. That is all I think of right now.

Q. Will the line which you have selected and which is proposed to be adopted, carry you to any other street in the town of Martinsville?

(Inasmuch as it is claimed by the defendant that the resolution and plat filed in evidence limits the line adopted to the ground between the depot and the Rucker & Witten Factory, the defendant objects to any testimony as to the intention of the petitioner to extend said line or to construct any other line unless the proper adoption of such extension or other line of first properly proven by resolution and plat of the board of directors of said company).

(By agreement of counsel, it is understood that this exception shall relate to any testimony of this witness relating to any other line than that between the depot and the Rucker & Witten factory, or any extension thereof, and that as to the ruling of the court in admitting such testimony, the defendant's exceptions are saved to her in
91 each and every instance as if specifically made.)

A. One fact occurs to me in connection with the other testimony that I gave. Since the first of January of the present year, we have had more solid or team track cars to come into Martinsville at one time than we had track room of any kind to accommodate.

Q. I will ask you again, will the line which you have selected and which is proposed to be adopted, carry you to any other street in the town of Martinsville?

A. It will cross Fontaine street at about right angles.

Q. After leaving the property here sought to be condemned of Miss Ann Hairston, whose land will you have to cross in order to reach Fontaine street?

A. The land of the Rucker & Witten Tobacco Co.

Q. Have you a contract with the Rucker & Witten Tobacco Co., by which you have authority to cross that land and reach Fontaine street?

A. I have.

Mr. STAPLES: We think that the contract itself is the best evidence, and we ask for the production of a copy of the contract.

Judge GREENE: I will get a copy and file it. We haven't one here. I will have it before the court tomorrow.

Q. Now, Major, will there be access along the line from Fontaine street to the depot of the Danville & Western R'y, in Martinsville for the purpose of reaching the cars standing upon the track?

A. These cars will be standing on this proposed track, not at the station, and parties can reach such cars with ease from
92 Fontaine street. It is also proposed to have an entrance on the alley near the Alliance warehouse, near the proposed track.

Q. Has the city of Martinsville grown very much in size and business within the last year or two?

A. It has gorwn very much in business over our line, and I notice there is considerable building.

Q. Well, in your opinion, is this proposed extension of your track necessary for the public convenience and for enabling the railroad to meet the business demands of the city of Martinsville?

A. It is, sir. There is another fact of public interest which occurs to me, that probably the court would like to know. The manufacturers, or parties who use steam coal, are more conveniently located to the Danville and Western station than to the Norfolk & Western station. The coal, however, comes into Martinsville over the Norfolk and Western. The Manufacturers are very anxious to handle this coal on the Danville & Western tracks on account of saving which there would be in drayage and on account of convenience. We have an understanding with the Norfolk & Western traffic people that we will switch this coal to our tracks. It is not practicable now to do this, because we have no track room. It will be practicable if this proposed road is built, and that is the object of the understanding.

Q. Then this proposed extension will be, or will it not be, for the use of the public and for the reception and delivery of consignments by your railway to the entire public?

A. It will be for the use of the public in that cars loaded with carload shipments consigned to various consignees in Martins-
93 ville will be placed on these tracks to be unloaded, and empty cars will be placed on these tracks to be loaded by shippers.

Q. You mean by shippers, shippers generally?

A. Yes sir, shippers generally, anybody who wants to ship a carload of freight will get his car on the track.

Cross-examination.

By Mr. STAPLES:

Q. Major, can you give any reason for the remarkable increase of your incoming traffic in excess over the increase of your outgoing traffic for the past 12 months in this town?

A. I attribute it principally to the amount of building going on. A great deal of building material is coming to the city.

Q. Then you would call that a temporary increase, would you not?

A. No sir, I think the increase would be permanent.

Q. Then you think that within the next three years we will say, that there will be each year as much building in Martinsville as there has been in the last 12 months?

A. Probably not as much, but I think indications are that there will be a great deal of building and that the increase of business will be permanent.

Q. Do you happen to know what has been the character of the building done in Martinsville within the last 12 months?

A. Well, I can only speak generally. Some residences have gone up, a bank building, the public school is being built, and court house has been renovated; the clerk's office improved.

94 Q. What percentage of those buildings and projects have been completed?

A. Well, I do not know that any of them have been entirely completed.

Q. Will all that you have named be completed within the next 12 months?

A. I think so.

Q. Do you know of any other proposed or adopted improvements in Martinsville in addition to those?

A. Not of my own knowledge, no sir.

Q. Have you any reason to believe that in the year 1906 anything like as much building will be done as is now in process of completion?

A. I only judge from the general improvement in the town since I have been connected with the road. It has been very marked, and I see no reason why it should not continue.

Q. Hasn't the principle building which has been begun within the last 12 months been in the bank of which you spoke, the residence of Mr. Stevens, and the factory of the Rucker & Witten Tobacco Company, and the school building?

A. Spencer & Company have built a large addition to their factory. There may be some other improvements that I haven't noted. Those were very apparent.

Q. Do you think that the building prospects alone for the town of Martinsville would justify your company in making an improvement of this kind?

A. I think the general business would justify it. The general business demands it.

Q. You don't think that the building itself would?

A. Well, the building itself, if it was anything like in

95 proportion to the present year or last few months, that alone would require it.

Q. Don't you think that the building business in Martinsville is a purely temporary matter?

A. No sir.

Q. You think that same increase will continue?

A. I think so.

Q. Then you expect your incoming business in Martinsville for what you would term a permanent future, to be from 80 to 100 per cent. in excess of your outgoing business?

A. I don't know that it will be of the outgoing business.

Q. It has been that much in excess for the past year, hasn't it?

A. Let me see the figures a minute.

Q. I don't mean the total business. I mean the increase.

A. The figures show that the inbound business increased about 89 per cent. over the corresponding month last year, but the outbound business increased about 16-2/3 per cent.

Q. Isn't the outbound business a better indication of the permanent increase than the inbound business?

A. I don't know that it is. I don't think that it is.

Q. The outbound business has not been affected by any building that has been going on here, has it?

A. No.

Q. The inbound business has?

A. The outbound business will be indirectly affected by building, because these factories are enlarged, and the outbound business will increase.

96 Q. Then you think that the increase in the outbound business is a better index of the general increase of the business in the town than the inbound business?

A. No, I think one is as good an index as the other.

Q. I don't mean as to an index, I should have said the more accurate measure of the increase?

A. No, I don't know that it is.

Q. Isn't this projected track from the depot to the Rucker & Witten Tobacco Co., adopted pursuant to a contract between your company and the Rucker & Witten Company?

A. We have a contract with the Rucker & Witten Co.

Q. Does that contract relate to the payment of the costs of the proposed construction?

A. It relates to it, yes sir.

Q. Does it relate to the payment of the costs of these condemnation proceedings by the Rucker & Witten Tobacco Company?

A. By the contract, the Rucker & Witten Tobacco Co. is to furnish right of way for the track and pay the costs for the right of way.

Q. We ask for a copy of that contract, if your Honor please.

Judge GREENE: That is the same contract I just said I would produce here.

Q. Major, is the track which you spoke of as the Tabernacle track connected with your main line at both ends?

A. Yes sir.

Q. Where is the track which you spoke of as the spur track?

97 A. That is parallel with the main line, and also parallel with this Tabernacle track, and on the west of the main line, the Tabernacle track being on the east or north and south.

Q. How long is the spur track?
A. That spur track is about 190 feet.
Q. Or about six cars?
A. No sir, it wouldn't hold six cars. The cars are about 40 feet.
Q. It would hold about five cars?
A. Not quite five cars; it would hold five short cars.
Q. Is that track accessible to teams?
A. No sir.
Q. Is it not practicable to make it so?
A. No sir.
Q. What is the objection?
A. Can't get to it all. There is an embankment and a tremendous gulley, and besides there is a fence. Mr. Lester's fence is so near that the teams can't get to it.
Q. What is the character of the ground on the north side of the main line?
A. The Tabernacle track is on that.
Q. I mean the north of it, next to Lesters. If you were standing on the main line and looking towards the spur track, what is the character of the land?
A. There is a tremendous fill there.
Q. What is the character of the land over which the Lester switch runs?
A. That is quite a grade; I would say about the same grade as the Tabernacle siding until you strike Mr. Lester's fence, and
98 then it is practically level inside of his yard.
Q. Wouldn't it be practicable, with Mr. Lester's permission, to use that track for unloading purposes inside of his yard?
A. If he gave you permission, it would be.
Q. Wouldn't you have the right under your charter to condemn that track, and any lands on either side of it for that purpose?

Objection: Over-ruled.

A. We would if the track was to be used for the public. Lester's track used as a team track would work a hardship on the public.
Q. In what way?
A. It is difficult to get to with the teams.
Q. Is it any further from the corner of Franklin street and Depot street to the Lester factory than it is from the same corner to the north end of the Rucker & Witten Tobacco Company's factory?
A. I don't know that there would be much difference in the distance. But the majority of business houses in Martinsville could reach the proposed track with very much more convenience and over a better road than they could the track in Mr. Lester's yard.
Q. You think then that it is the condition of the road and not the distance that would work the preference?
A. Both the distance and the condition of the road.
Q. What factories are nearer to the north end of the Rucker & Witten factory than to the Lester siding?
A. I said business houses and factories. Rucker & Witten factory

is of course, nearer; the Martinsville Grocery Company would
99 be nearer and over much better roads. It is a wholesale grocery concern that handles a great deal of solid team track freight. On the road leading to Mr. Lester's place, two teams could not pass each other, there being only room for one team at a time.

Q. The street is so narrow that only one team can pass?

A. Yes sir.

Q. That is the street over the fill you mean?

A. Yes sir.

Q. How about Lester street?

A. That would be a very much greater distance over that street.

Q. How long is the narrow part of that street of which you spoke—over what distance?

A. I don't know exactly. I suppose 250 feet, probably 300. I don't know exactly as to that.

Q. You think a two per cent. grade is a dangerous grade on which to stand cars?

A. Yes sir.

Q. What is the grade of your spur switch?

A. It is about the same as Tabernacle.

Q. About two per cent.?

A. Yes sir.

Q. Could it not have been constructed on a level if the company had wanted to do it?

A. I think not.

Q. Why?

A. They would have constructed the main line on a level if they could.

Q. I know, but the main line had to reach a certain point, but the spur stops with a dead end.

100 A. Yes sir.

Q. Couldn't that dead end have been below the track or on a dead level with it, either?

A. It could have been.

Q. Could it have been above it?

A. Yes sir.

Q. Wouldn't it have been perfectly feasible to construct that spur track on a level on a lighter than a two per cent. grade?

A. That might have been feasible, but it would have been of no use except for storing cars. You could not get teams to it. There are no team track cars on it now.

Q. Then for the use to which it is at present adapted, it could have been as well constructed on a level as on a grade?

A. Not as well, no. It could have been.

Q. If a two per cent. grade is such a dangerous grade for standing cars, and the spur track is only used for standing cars, and could have been constructed on a lighter grade, why haven't you changed that grade to relieve the situation of its danger?

A. The spur track is only used when absolutely necessary, and that is seldom. If a car should get loose on the spur track, it would do no other damage except to the car. It would derail the car, and it would end there.

Q. Wouldn't a derailing switch at the lower end of the Tabernacle track limit the danger of a car getting loose to the one
101 car?

A. It would reduce the danger.

Q. Have you ever put in such a derailing switch?

A. We have. I stated in my evidence that we had.

Q. You stated that there was 500' feet of level track on the proposed extension?

A. Yes, sir, about 500 feet.

Q. Will you look at that map and see if that is 500 feet between stations 5 and 10?

A. Yes sir, that is it.

Q. State what is the grade immediately to the south of that on the proposed track?

A. About 2 per cent.

Q. Isn't it marked two per cent. grade on the profile?

A. Yes sir.

102 Q. Then why do you say about?

A. It is a two per cent. grade.

Q. Then that portion of this track between stations 1½ and station 5, couldn't that safety be used for storing cars?

A. Not except when it was absolutely necessary on account of the lack of room.

Q. The grade between station 10 and station 12 is shown as 1½ per cent. grade. How do you think that the public will have access to that 500 feet of level track?

A. They will reach that down Fontaine street, and it will come into this ground occupied by the track from Fontaine street.

Q. As I understand, the teams reaching that 500 feet of level track from any point on Franklin street must go north on Franklin street to Fontaine street, and down Fontaine street to the proposed track, to the level part of the track?

103 A. Yes sir.

Q. And there find access to the cars. Do you propose to make all of that 500 feet accessible?

A. Yes sir, that is our purpose.

Q. How much land will it require on that side of the track on which you stand the teams for it to be used for that purpose?

A. About 40 to 45 feet including the track, and outside of the track, say 30 feet.

Q. It would not be practicable then to stand these cars for unloading and loading on less than 40 feet?

A. Well, 40 feet including the track,—the entire track. You might do it in 25 feet from the track, not including the track.

Q. On this map I see that at station 8+86 you leave the land of Miss Ann Hairston. Is that correct?

A. Yes sir.

104 Q. Then you only have 114 feet of level track on the land of the Rucker & Witten Tobacco Company's land?

A. No, we lack more than that.

Q. From station 5 to station 8+86, or 386 feet of that is on the Hairston land, leaving 114 feet on the Rucker & Witten land?

A. In that particular section. After we reach the Rucker & Witten plant there is considerable portion of the land level.

Q. But not for access to the public?

A. Not that particular part of it.

Q. So the only part of the level track to which the public has access, which is not on the Hairston land, is 114 feet?

A. If that map indicates that.

Q. Well, doesn't the map indicate it?

105 A. I can't see very well. The engineer who made the map will be on the stand, and he can explain it fully to you. That seems to be the way it is indicated there.

Q. Is it the purpose of your company to use any of the land which they are seeking to condemn from Miss Hairston for a roadway for teams?

A. Yes sir.

Q. Was there any resolution of the board of directors of your company authorizing the condemnation of lands for a wagon roadway?

A. There was a resolution authorizing the condemnation of lands to get better terminal facilities and reach the plant of the Rucker & Witten Company.

Q. Was there any other resolution adopted by your board

106 of directors with reference to this proposed track, or anything incident to it or to its extension other than that which you have filed here?

A. No sir.

Q. You don't propose to construct but one track up to the Rucker & Witten factory do you?

A. That is our present intention.

Q. How then can you use that 500 feet in the middle of this track for the storing of cars for use by the general public, and at the same time supply the enormous demand of the Rucker & Witten Tobacco Company for cars coming and going on one track?

A. That would be a simple matter. It would just require a little switching.

107 Q. Wouldn't that switch interrupt the access of the general public to those cars?

A. Not as a rule.

Q. Then you think they can be unloaded while they are being switched?

A. No sir, we would have certain hours a day to place cars for the Rucker & Witten Company, and at the same time place cars for the public to load or unload.

Q. How many cars do you estimate that you would be called upon to furnish the Rucker & Witten Tobacco Company on this siding each day?

A. Not more than three a day, I should estimate.

Q. Your profile here shows that you have opposite the Rucker & Witten factory a level track for a distance of 100 feet. Will that supply the demand of the Rucker & Witten Tobacco Co.?

A. I don't think that shows the complete Rucker & Witten plant. It would be considerably more than that.

Q. You spoke of an alley near the Alliance warehouse through which the public would have access to the proposed track. Do you know whether there is such a public thoroughfare or not, or whether that is private property?

108 A. I understand it is private property. I said we hoped to arrange for it.

Q. You have no rights there at this time?

A. No sir.

By Mr. CARTER:

Q. If you could secure the privilege of going down that private property alongside the Alliance warehouse, could you possibly turn with a team on the space of ground that you would condemn on this proposed map and get into it?

A. I don't think there would be any difficulty about that. It might be necessary to cross the track.

Q. Could you possibly cross the track with a team—isn't it at that point right opposite that alley—wouldn't there be an embankment on the east side of your track that would be 30 feet deep?

A. No, I think not.

Q. Then why is it that you condemn such a wide space here opposite that alley—isn't that for the purpose of the land and dirt rolling down at that point—isn't there a ravine right opposite that alley?

A. Yes sir.

Q. Would it be possible for you to cross that track with a team?

A. My present judgment is that we could get in with teams there. I wouldn't state that positively, but my opinion is that we could.

109 Q. Just opposite the alley, alongside the Alliance warehouse, are not the stalls of the Alliance warehouse located on Miss Ann Hairston's property?

A. Yes sir.

Q. Doesn't the ground decline very rapidly into a hollow leading from your present fill?

A. Yes sir.

Q. After you have built your proposed line, wouldn't the grade east of your line about where these stalls are now, be so steep that a horse couldn't possibly go up or down?

A. I think it would be possible for teams to go in on the platform side of the track, and if necessary cross lower down, if necessary.

Q. You mean to turn in after you go down this hollow and strike your right of way?

A. To turn in, and if necessary to cross further down towards Fontaine street.

Q. Would it be practicable, in your opinion, on any line anywhere from station 3 to station 5, would it be possible for a team to cross that track and recross it and get back on the track of your proposed line?

A. It might not be at those two points, but they could cross it anywhere between 5 and 10.

Q. Then a team entering this alley upon your right of way,

through this alley, would have to go down on your right of way to some point between station 3 and station 5, cross over to the east side of the track, and unload on that side?

110 A. There would be room between the track and Miss Ann Hairston's line.

Q. Even if you crossed over, you would have to cross back?

A. Yes sir, unless you went over on Fontaine street.

Q. Do you know how far it is from Alliance warehouse to Fontaine street?

A. I don't exactly know. Fontaine street comes in there at the present brick factory occupied by the Rucker & Witten Tobacco Co., on the east side of Franklin street. I don't know the distance. I would say though about a square.

Q. Isn't it 1500 feet?

A. Well, it might be; I hardly think it is quite that far, though.

Q. How far then would it be from Franklin street, or rather, the corner of Franklin and Fontaine streets to your proposed line?

A. Not more than 200 feet, or 150 feet.

Q. How far is it from Fontaine street back to your level track along your right of way?

A. About 150 or 100 feet. I don't know that those distances are accurate at all; I don't suppose they are.

Q. That means the level track that is devoted exclusively to the public?

A. Yes sir.

Q. That would make it then a distance from the Alliance warehouse, or the terminus of your present line on Franklin

111 street, between 18 and 19 hundred feet, would it not?

A. With those figures I gave it would, but I don't think it is that far. I think the actual measurement would show it a much less distance.

Q. This map is an exhibit filed with your petition in this case, is it not?

A. Yes sir.

Q. Does that map or anything on it indicate that the public has any access whatever to your proposed line?

A. I don't know that the map does. No, it does not show Fontaine street there where we propose for the public to get in.

Q. Doesn't that map show on its face that the proposed line is entirely upon Miss Ann Hairston's ground, and the Rucker & Witten ground, and that the public has no access whatever?

A. It doesn't show Fontaine street there.

Q. That is not the question I asked you. Doesn't your map show itself that there is no access whatever to your proposed line except over private property?

A. Well, the map itself may show that.

Q. Is there any other portion of your proposed line to be devoted to the public except the 500 feet of level track which you have pointed out, between station 5 and station 10?

A. The whole track from where it leaves our main line until it

strikes the Rucker & Witten plant will be devoted to the
112 public, but the only safe place on the track on which to stand cars will be the 500 feet?

Q. That would be the only portion that the public could reach to load and unload?

A. We might be able to reach other portions of the track, but it would be on slight grades, and it would be better to stand them on this 500 feet.

By Mr. STAPLES:

Q. About how many cars do you estimate your company will be required to handle a day, placing them there for the local business?

A. Judging from the business in the last 60 or 90 days, I would say the average would be from 10 to 12. We have had as many as 18 team track cars at one time in the last 20 days.

Q. Didn't you testify on direct examination that you had already accommodated and could accommodate 13 cars daily?

A. Not team track cars, no sir.

Q. Didn't you say that you had shipped 13 cars for the Rucker & Witten Company in one day?

A. Yes sir.

Q. How did you load them?

A. I think they were four days loading them. They placed three or four to be loaded, and when they were loaded, we would take them out and stand them at different part of the yard, and when the entire shipment was loaded, we had an engine here waiting,
113 and we just hooked it on and moved it out.

Q. Do you keep a switching engine at Martinsville?

A. No sir.

Q. You said that when you made your negotiations, or attempted your negotiations with Miss Hairston, she referred you to her nephew. You were unable to agree with him?

A. Yes sir.

Q. Did you report that fact to Miss Hairston?

A. I did not, no.

Q. Did you make any further attempt to negotiate with her?

A. No sir.

Q. To whom did you make your report of your failure to negotiate with Mr. Hairston, to the Rucker & Witten Company or to your own company?

A. I reported it to the railway company, to my superior officer, that I could not agree, and I also notified the Rucker & Witten Co.

Q. Were you not limited by the Rucker & Witten Tobacco Co., in the price which you might pay Miss Hairston for this property?

A. No sir.

Q. You were not?

A. No sir.

Q. You were not authorized to pay any particular sum?

A. No sir.

114 Q. You were authorized to pay any sum that your judgment could determine upon?

A. I had no agreement about it whatever. I went of my own accord to see Miss Hairston and if she had priced the land at what I, after conference with citizens of Martinsville who were informed, considered a reasonable price, I would have purchased the property.

Q. You said they were to pay for the right of way?

A. Yes sir.

Q. Did they leave that matter entirely in your hands?

A. They didn't state the price to me at all.

Q. Did you feel authorized to pay any price which you saw fit to pay?

A. I felt that I could pay any price that I thought was reasonable.

Q. How much land will your company have on the west side of the 500 feet of level track if it succeeds in these condemnation proceedings?

A. Well, we would have the entire—I don't know exactly how much. We would have the right of way, whatever was necessary.

Q. How much do you think that is, Major?

A. Well, it depends upon how long that building of the Rucker & Witten Tob. Co. is.

Q. I mean along the 500 feet of level track on the west side of it, I mean by the side of it. How much west of it will you have?

115 A. The average width there is about 40 feet.

Q. I am not talking about the width of the way you are seeking to condemn, I am speaking of how much you will have on the west side of your track, after you have laid your track, for the use of teams?

A. We would have about 30 feet, 25 or 30 feet.

Q. When you gave your engineer his instructions as to the location of this line, what instructions did you give him with regard to the limits of this right of way you are seeking to condemn?

A. I said to him that we wished to get the most feasible track. I explained to him that the track had been contemplated down Franklin street and we had decided to abandon that, and I wanted him to get the most feasible track to reach the Rucker & Witten Company's plant and at the same time we wished to use as much of it as possible for team track, to get more team track.

Q. Did you instruct him to so locate his line that over that 500 feet of level track you would have room for teams?

A. I didn't know at that time that there would be 500 feet. The general idea was to get room for team track cars as much as possible.

Q. Did you give him any instructions whatever as to staking out enough line for teams?

A. Not specifically, I simply explained to him that we wanted team track room, and at the same time to reach the Rucker & Witten plant.

116 Q. Is it not a fact, Major, that your instructions to him were to locate a line from the depot to the Rucker & Witten factory, and stake off the land that would be necessary for that line?

A. Those were the instructions in part. Keeping in mind also acquiring proper team track room.

Q. How much room did he advise you he had staked out in order to get sufficient team track along that level track?

A. Well, I don't know that he advised me specifically that he staked out any, but he called my attention to the fact that between stations 5 and 10 the track was entirely level.

Q. He didn't report to you then that he had staked out any land that could be used for team purposes?

A. He said that portion between stations 5 and 10 would be suitable for that purpose.

Q. Did his report have reference to the track or to the roadway for wagons?

A. My understanding is that it refers to both track and roadway.

Q. He made no specific report as to the roadway?

A. No sir.

Q. But you do intend to use a portion of the land which you are seeking to condemn for wagon purposes?

A. It is our purpose to use as I stated the 500 feet of level space there to stand cars on and the land of course, we will have to use adjoining that for teams to reach the cars.

117 Q. That is the land which you condemn adjoining that?

A. Yes sir.

Q. What is the nearest point that you have switching facilities with the N. & W. Ry. Co.?

A. Cola, about three miles west of here.

Q. No switching facilities in the town of Martinsville?

A. No sir.

Q. Are you able to handle on the grades of your road between Cola and Martinsville, those two per cent. grades, and I believe you have one three per cent. grade, the cars which are delivered to you by the Norfolk & Western Ry. Company?

A. We will be able to handle them, yes sir. We are able to handle those delivered now without any trouble.

Q. How many of those cars can one of your engines pull over one of those grades?

A. Eight loads.

Q. What weight of cars, I mean weight and capacity?

A. Well about eight 30-ton cars, our heaviest engines.

Q. How often is that engine conveniently accessible to Martinsville for that purpose?

A. At present, it passes here twice a day.

Q. On what train?

A. Trains 21 and 22. 21 goes west, and 22 going east.

Q. Passenger or freight?

A. Mixed.

118 Q. Is it your idea to use the engine from your mixed train for the purposes of switching cars for a distance of three or four miles?

A. No sir, it is our idea to use the engine on our local freight train.

Q. What is the capacity of that engine?

A. That will be the heaviest engine. We are simply using it temporarily on this other train.

Q. What is the population of the town of Martinsville?
A. Between 4,000 and 4,500, I think.
Q. That is just your impression?
A. Yes sir.
Q. What was the population of the town of Martinsville 12 or 18 months ago?
A. It was somewhat less than that I think. I haven't figures.
Q. But as far as any increase in the population of the town of Martinsville is concerned, you speak merely from hearsay and general information?
A. Yes sir.
Q. Do you know just exactly where Fontaine street is on the ground?
A. I know where it is; I don't know that I could locate it exactly on that map, but I know the street and the ground.
Q. Stand aside.

119 J. A. HALL.

By Judge GREENE:

Q. Where do you reside?
A. Down near Danville on the Dan River.
Q. What is your occupation?
A. Civil engineer.
Q. How long have you been a civil engineer?
A. Something over 20 years.
Q. Has your business as civil engineer been in connection with railroad construction?
A. It has been principally that, yes sir.
Q. Did you make the map which is filed in the clerk's office in this cause?
A. Yes sir.
Q. Showing the lands of Miss Ann Hairston?
A. Yes sir.
Q. Under whose instructions did you make it?
A. Major Parker, the superintendent.
Q. What were you instructed to do?
A. I was requested to make a survey of the land from the main line of the Danville & Western to the Rucker & Witten factory, and at the same time to provide as much facility as possible for the unloading of cars for the general public.
Q. Did you make the map with that view in mind?
A. Yes sir.
120 Q. Did you select the locations shown on that map as the best possible locations for the extension of the line for the purposes sought to be gained?
A. Yes sir.
Q. The selection of that line was left altogether to you?
A. Yes sir, wholly to me.
Q. Does the map which you made show the profile of the property that was intended to be taken, together with the grades?

A. Yes sir, it shows the whole thing complete.
Q. Were there any cuts and fills?
A. Yes sir, they are shown there.
Q. Were there any trestles of bridges?
A. No trestles or bridges at all.
Q. Were you originally engaged as an engineer in the location and construction of the Danville & Western R. R.?
A. Yes sir, well, not location; I was engineer in charge of the construction from Danville to Martinsville, but I didn't make the location.
Q. You are acquainted with the location of the depot at present?
A. Yes sir, in an approximate way.
Q. Are the facilities at the present location sufficient to enable the road to accommodate the business of the town of Martinsville?
A. I don't think so, according to what I have heard about the amount of business here. Of course I have no specific infor-
121 mation about the actual amount of business that is done, but so far as I know, I should say not.
Q. Are the grades at and about Martinsville depot of such a character as to allow the standing of many cars upon the track with safety?
A. No sir, I do not consider any of those grades satisfactory for standing cars on.
Q. What is the reason of the danger?
A. If you stand cars on the grade they are liable to get loose and cause trouble.
Q. How large was Martinsville when this road was completed—how many people do you reckon it had?
A. It was very small. I would say a few hundred, quite a village.
Q. What do you suppose the population of the place now is?
A. I guess 5,000, I really don't know exactly about it.
Q. Are you sufficiently acquainted with the town as to say whether there has been a large increase of business of all kinds in the town since that time?
A. O yes, I think so, considerable.
Q. Has there been?
A. Yes, considerable.
Q. Has it increased very rapidly within the last year or two, or three years?
A. Yes sir, I think so. Considerably more than previous to that time in the last few years.
122 Q. From your knowledge of the necessities in railroad transportation, do you consider the present terminal facilities of the Danville & Western Ry. sufficient to accommodate with any convenience the traffic of the road?
A. No sir, I don't. If the information that I have got about the number of cars that are handled here is correct. The only information I have on this subject is such as I have heard. I don't know definitely about it at all.
Q. What years were you auditor of the Danville & Western Ry., or the Danville & New River R. R.?

A. From 1883 to 1886.

Q. Does the statement of the business exhibited here tonight show a very large increase over what it was at that time?

A. I haven't seen the statement exhibited tonight with reference to dollars and cents. The greatest year's business that I had anything to do with while I was Auditor of the road was about, I think, $90,000.00, as well as I can recollect.

Q. Did that include the Leaksville branch also?

A. Yes sir.

Q. Does the map or profile which is filed in this case, show where the lands of Miss Ann Hairston begin and end?

A. Yes sir.

123 Q. Will you indicate where that land begins, that land of Miss Ann Hairston's sought to be condemned, where it begins and where it ends?

A. It begins at 2+12½, and ends at 8+86. It is just about that.

Cross-examination.

By Mr. STAPLES:

Q. When Major Parker instructed you to locate this line, did he direct you to stake off enough land so that he could have room for teams to stand and pass along the side of the tracks?

A. Major Parker gave me orders to come here and locate that track, and he said he wanted me to put in as much suitable ground as possible for the use of teams alongside the track with reference to loading and unloading of those cars, and as for his saying specifically that he wanted me to do that thing, I don't recollect that he did say so, but I understood from him that I was to furnish in my survey the necessary facilities for such handling of business.

Q. Your survey then was with reference more to the track and the cuts and fills that were incident to its construction than to the construction of any wagon roads?

A. No, the survey that I made was so made with reference first to getting a suitable distance from the dwelling houses located on Miss Hairston's land, and then of course with reference to

124 the facilities which he required. I wanted to keep outside of the law in that, which I understood to be 60 feet.

Q. The line which is shown to be two curves connected by a tangent, and followed by a tangent marked proposed spur track, indicates the center of the track, does it not?

A. Yes sir, that is the center.

Q. I notice, Mr. Hall, that the property lines on the east of that center line are marked limit of the lands sought to be condemned, are at varying distances from that center line. Will you explain why that was?

A. Well, it was when I staked off that width, of right of way, it was to allow for cuts and fills, and also for this team track.

Q. Did you leave any land on the east side of this center line for the use of teams?

A. I don't recall any details now about it, I think I got plenty of

land such as was necessary, but I couldn't say offhand about any particular place.

Q. Isn't it a fact, Mr. Hall, that the line between points 9, 10, 11, 12, 13 and the beginning point practically represents the position of the slope stakes for the cutting and grading of that proposed track? By the slope stakes, I mean the stakes which would be set at the foot of the fill, or the top edge of a cut?

A. Well, this line that you have indicated here doesn't show any right of way at all, or any work on it.

125 Q. I mean from here. From right here back. 9, 10, 11, 12, and 13?

A. O yes, that line. No it does not. I don't think it does. Yes, about that, as well as I can judge offhand, figuring the slope.

Q. And the fall of the land?

A. Yes sir, the fall of the land and so on.

Q. What width embankment does that provide for?

A. 14 feet on top.

Q. So that if your track is constructed by the center line as shown on the map, with a roadbed of 14 feet, the land which you have staked out on the east of the track will be practically taken for the slopes or cuts and fills?

A. Yes sir.

Q. You would then have no room on the east side for teams?

A. That depends entirely on the method of construction. Such a thing as a retaining wall might be put up.

Q. I am speaking of the plan as adopted by you, and the survey as made by you?

A. I made a profile of this center line, but just what method of construction Major Parker is going to finally order, I don't know.

Q. Don't you know, Mr. Hall, that if it had been intended to construct wider banks than 14 feet, you would have staked out a wider right of way on the east side rather than face the necessity of building retaining walls?

126 A. Well, I know that it looks that way, but I don't know what orders Major Parker might give, or what his intentions might be.

Q. You had no instructions from him in detail in reference to that?

A. No sir.

Q. And unless you had built retaining walls, you would be limited to a roadbed 14 feet wide within the limits of that survey on the east side?

A. I can't say definitely. Approximately, it is true.

Q. By a roadbed 14 feet wide, you mean 7 feet on each side of the center of the track?

A. Yes sir.

Q. How much of that is actually taken up by the crossties?

A. The crossties are 9 feet long.

Q. Or 4-1/2 feet on each side of the track?

A. Yes sir.

Q. Leaving a margin of 2-1/2 feet?

A. Yes sir.

Q. At station 3 your profile shows a cut of about 3-1/2 feet, does it not?

A. About that.

Q. How wide does this map show your right of way to be on the west side at station 3?

A. Between 6 and 8 feet.

127 Q. At station 3+50 you are practically on grade, are you not?

A. Just about, yes.

Q. How much width have you got there on the west side of the center of the track?

A. That is about 5/8 of an inch, I think, or about 30 feet.

Q. At station 3+75, you have about a 15 foot fill?

A. About that, yes sir.

Q. What width of right of way have you on the west side of your track?

A. That is about 3/4 of an inch, that would be 37 or 38 feet.

Q. With 7 feet for 1/2 of your embankment, and 22-1/2 feet for the slope of 1-1/2 to one, you would require 30 feet of that at least?

A. About that, yes.

Q. At station 5 you have a fill of about six feet have you not?

A. That is right.

Q. What is the width there?

A. That is about 3/8 of an inch, or about 18 feet.

Q. At that point, a single track would require 7+9, or 16 feet, would it not?

A. About that, yes sir.

Q. At station six, you are very near grade, are you not?

A. Yes sir.

127½ Q. What is the width of the right of way as located there?

A. That is about 1/4 of an inch, or 12 1/2 feet.

Q. It increases from that to station 8+50 regularly to about what distance?

A. About 28 or 30 feet.

Q. At station 8+50 you have a fill of about 13 feet, haven't you?

A. Well, it is a fill on the center, about 13 feet. The ground comes up pretty rapidly.

Q. Then according to those figures as you have given them, from station 3 to station 8+86, would it be possible for you to construct your line on the land which you seek to condemn, and have any room at all for the roadway?

A. Yes, it would be very possible.

Q. How would you do that, Mr. Hall?

A. There is any quantity of ways. One of them is to build a retaining wall on the east side.

Q. I am speaking now if the center line of your track should be built as located, would you have any room on the west side of that track for teams at all?

A. I don't know that the center line is going to be built as located. No, not by ordinary construction, I should say.

Q. By extraordinary construction?

A. Yes, by extraordinary construction.

128 Q. In what way would you put a roadway on the west side of the track at station 6, where you have 12½ feet of right of way?

A. Well, you could do that. The crossties, say takes up 4 or 4½ feet on one side of the center. 7½ feet with an ordinary wagon is sufficient.

Q. You think that is sufficient to load from a car and pass?

A. I think it could be done.

Q. Haven't you a fill at that point—a slope?

A. No, that is very near grade.

Q. At station 5+50?

A. That is about a three foot fill. It could be built up the same way.

Q. You mean you could build a stone wall?

A. If it was necessary.

Q. What is the width of the cas?

A. I think about 8 feet, as well as I can recollect.

Q. But if you built a retaining wall along the property line as surveyed on the west side from station 5 to station 8+50 and took up 4½ feet of that for your right of way, your wagon road would be limited to a distance varying from seven to twelve feet, would it not?

A. Yes, about that.

Q. Do you consider that a wagon roadway along that level track from 7 to 12 feet would supply the large demands of the business in Martinsville?

129 A. I don't know anything much about the demands of the business in Martinsville.

Q. Then when you surveyed this line you didn't survey it with reference to the demands of the business of Martinsville?

A. Why, not particularly with reference to the business of Martinsville. I surveyed that line so as to get in as much level grade as I could, and at the same time get in the best line I could.

Q. As a fact, your location and your survey of this ground sought to be condemned was with a view to the constrution of the track and the track alone, was it not?

A. No, it was with a view to this level grade that I have spoken of, and the adjacent wagonroad and all that sort of thing, as well as I could get.

Q. Then you did plan for a wagon road 7½ feet wide?

A. I don't remember in detail at any point. I did try to get in the roadway for the railway company and the public.

Q. If you planned for the roadway, you must have considered the width of the roadway in making your plans, didn't you?

A. Yes, of course.

Q. As an engineer you wouldn't undertake to plan for a roadway without considering its width?

130 A. Certainly not.

Q. And you did consider it practicable and sufficient for the needs of your company to allow you a width of from 7 to 12

feet of roadway, even when that was secured by building a retaining wall?

A. Yes sir.

Q. About where would Fontaine street be if it were shown upon this map?

A. I have been told that it goes about 14+70 on that map. I have never been able to ascertain exactly where Fontaine street comes yet, except in an approximate way. That being the case, I did not put it on the map.

Q. 12+70 is about the point indicated by the figures 15 between the two arrows, is it not?—I will mark that "A"—about the point "A?"

A. That is about right, yes sir.

Q. Fontaine street runs practically at right angles to the track at that point, does it not?

A. About that, so far as I learned. I never knew just in detail where Fontaine street was.

131 GEORGE L. GRAVELY.

By Judge GREENE:

Q. Mr. Gravely, did you as attorney for the Danville & Western Ry. visit Miss Ann M. Hairston with Major Parker?

A. Yes sir.

Q. For the purpose of obtaining by purchase or otherwise, the right of way over the track sought to be condemned here?

A. I did.

Q. Please state what occurred?

A. Major Parker and myself called on Miss Ann Hairston for the purpose of purchasing the land wanted by the railway company, and had a conference with her upon the subject. She stated in substance to us that she didn't care to sell any land; that she didn't have any to sell. We pressed her to make us an offer of what she would take for the land needed by the company. She insisted that she didn't care to sell at all, and stated that if we insisted upon a proposition, that she would take for the land that we wanted, $5,000.00. We stated to her that we considered that very exhorbitant, and that we could not consent to give that amount; that if she would make any reasonable figure, that we thought we could agree with her. She repeated that she didn't care to sell, but requested us to see her nephew, Watt Hairston and confer with him on the subject. We met Mr. Hairston on the street and stated that we had been referred to

132 him by his aunt in reference to this matter, and asked him for a proposition for the purchase of the land. He would make no figure, but stated that he would see his aunt in connection with the matter again and talk with her on the subject. A day or two after that, I saw Mr. Hairston, and asked him if he had seen his aunt in reference to the matter, and he stated that he had seen her, and that there would be no chance for us to agree with her upon a price for this land, and I told him then that if that was the case,

that we would have to proceed to condemn it, and that is about the facts with reference to the attempt to agree with her.

Cross examination.

By Mr. HUNT:

Q. You are one of the attorneys of record in this cause?

A. Yes sir.

Q. Were you acting in the capacity as attorney at that time, as well also for the Rucker & Witten Tob. Co., or any member of its firm, as well as the Danville & Western Ry. Co.?

A. You mean in this matter?

Q. Yes sir.

A. I was acting solely as attorney for the Danville & Western Ry. Co. I am not retained at all by the Rucker & Witten
133 Tob. Co., in this matter.

Q. Did you report the price of the land to any member of the Rucker & Witten Tobacco Co., the price asked by Miss Hairston?

A. I don't recollect. I made no special report to them. I may have mentioned to Mr. Rucker that I found that I could not agree, I may have mentioned it to him afterwards, and think it is probable that I did, that the price that Miss Hairston asked.

Q. You knew then that Mr. Rucker was to pay for the right of way, didn't you?

A. I don't know whether at that time the contract with Mr. Rucker and the Danville & Western Ry. Co., had been entered into or not, but I supposed that they would have to pay for the right of way.

Q. You were so informed, were you not?

A. That was my understanding.

Q. By whom, if anyone, were you limited in the price of the purchase when you went to Miss Hairston for that purpose?

A. I wa-n't limited in the price by anybody. As a matter of fact, I went simply with Major Parker, and I would have been governed by him in the matter, as the agent of the railroad company.

Q. Did you hear Maj. Parker say that he didn't think that the Rucker & Witten Company would pay the price asked?

A. I don't recollect that I did.

134 Q. You have no recollection of that?

A. No sir, none. He might have said so. I don't recollect it if he did.

Q. Is it not true that you and Major Parker discussed the price which the Rucker & Witten Tob. Co., would be willing to give for the land?

A. I don't know that we had any discussion of that subject. We discussed as to what would be a reasonable price for the land, and what we ought to pay for it.

Q. You don't say then that Major Parker and yourself didn't discuss as to the price which you thought the Rucker & Witten Company would pay?

A. No, I don't recollect that we discussed that, or that we didn't.

Court adjourned until Thursday morning, at 9 o'clock.

9—77

135 THURSDAY MORNING, *January* 19, 1905—9 o'clock a. m.

R. WHITE BLAIR.

By Judge GREEN:

—. Mr. Blair, where do you reside?

A. I reside here, sir.

Q. In Martinsville?

A. In Martinsville.

Q. How long have you resided in Martinsville?

A. I have lived in Martinsville something over seven years.

Q. What has been your business and occupation in this town?

A. I have been in the wholesale grocery business for five years.

Q. Did your business as a wholesale grocer throw you in frequent relations to the Danville & Western Railway Co?

A. It did.

Q. Are you acquainted with the depot and station grounds of that company at Martinsville?

A. I am.

Q. Please state to the court whether you think as at present constituted, they are sufficient to enable the road to do the business of the town of Martinsville, and surrounding country at that point?

A. I think they are very much in need of side track, track for loading and unloading. At present it is very insufficient.

136 Q. In your experience, have you met with difficulties in having your freight loaded and unloaded at this depot, and if so, to what causes are the difficulties attributable?

A. At times, we have had very great trouble getting cars placed because they didn't have anywhere to put them, so you could get to them with a dray.

Q. You would desire cars placed so you could unload freight coming to you and freight shipped by you, and the railroad, by reason of want of proper space, is unable to accommodate you. Is that true?

A. Yes sir, that is so. They couldn't place the cars where you could get to them with a dray.

Q. Has the business of Martinsville and the surrounding country increased to any extent since you have been in the wholesale grocery business here?

A. Yes sir, it has increased very materially.

Q. In your opinion, does such increase of business require the enlargement of the facilities of the railroad for receiving and shipping goods?

A. If they handle it with any satisfaction at all to the public, it requires it. It is very unsatisfactory the way it is.

Q. Can you say whether the present grounds at and around the station at Martinsville are all fully occupied by tracks now?

137 A. They seem to me to be, but even now, there is only one place that I know of that is really suitable for loading and unloading, and that only holds about three cars. There are places they could place cars on, but it is unsatisfactory to get to.

Q. What is the present population of Martinsville?

A. I suppose it is about 3800 people. 3500 or 3800.

Q. How many people were here when you came here seven years ago?

A. I suppose there was something like 2200, I should say. That is purely an estimate. I think that is correct.

Cross-examination.

By Mr. HUNT:

Q. Are you at present engaged in the wholesale business in the town of Martinsville?

A. I am not. I sold out the first of December.

Q. Is it not your intention and are you not at present making arrangements to leave the town of Martinsville, and go elsewhere to live?

A. I haven't decided positively to go elsewhere to live, but I am going elsewhere for a while, but I haven't decided where I will make my future residence.

Q. Isn't it your present intention to make your future residence in the Indian Territory?

A. I can't say positively that it is. I have some investments there. I am going out there next week, and it may be that
138 I will remain there, but I haven't positively decided to do so.

Q. You have, however, sold your business interests in the town of Martinsville?

A. Yes sir.

Q. Did you ever live in another city or town and engage in business which required the loading and unloading of freight cars for your business?

A. Yes sir.

Q. Isn't it true that the business men of every town have some trouble with the loading and unloading of cars?

A. Probably it is true, but I don't know that I ever saw the condition like it is here, or where additional tracks for loading and unloading is more needed than it is in Martinsville by the Danville & Western.

Q. Do you know anything of your own knowledge Mr. Blair of the magnitude of the business of loading and unloading cars in the town of Martinsville?

A. Yes sir.

Q. How many cars are loaded and unloaded at this point a day?

A. Well, I couldn't speak with any accuracy. I didn't count them every day. My place is just across from the station, and I know they are always crowded over there for room.

Q. You only know as to the business which you were engaged in and the cars which you received?

139 A. I know I frequently could not unload cars because they had no place to put them where I could get to them.

Q. That was the information given to you by the company's agent.

A. Given me by the agent and I could see for myself that all the available space was filled with other cars, and the cars that my goods were in were so located that I could not get to them.

Q. How many cars will the siding known as the Tabernacle siding accommodate?

A. I don't know how many cars. You can't very well unload down there for you are right in the street with a dray if you attempt it.

Q. Well, how many cars would that track accommodate?

A. I don't know, Mr. Hunt. I think I heard Major Parker say last night it accommodated about six.

Q. How many cars would that track accommodate, the track at the depot, the siding there?

A. I think you can get three.

Q. Between the depot and the street so you could get to them. Well, couldn't you get six there?

A. You could if both tracks were filled but you can only get to one track.

Q. They get shifted from the north track to the south track?

A. If both tracks are filled you can only work on three cars, loading and unloading. The other three are bound to be just stored there. It is impossible to load them and unload them.

140 Q. In the business which you were formerly engaged in, you used on an average a car a day, did you?

A. You mean outgoing and incoming?

Q. Yes sir.

A. Yes sir, I reckon I did, about a car a day.

Q. You don't undertake to say, I believe, what would have been the demand of the public as to the number of cars required daily?

A. No sir, I couldn't state positively about that.

Q. You don't know whether it would be more than three or four daily, or not?

A. You mean the whole town?

Q. Yes.

A. I think it would be decidedly more.

Q. I believe you said that you had no personal knowledge as to that matter, but that it was information that you had gathered from others?

A. O, no, it would be impossible for me to state the exact number. I would have to know the business of everybody in town, and I do not attempt to know that.

Q. Stand aside.

C. B. BRYANT.

141 By Judge GREENE:

Q. Where do you reside?

A. Martinsville, Va.

Q. How long have you resided at that place?

A. Nearly 58 years.

Q. Are you acquainted with the depot grounds and facilities for loading and unloading at the depot at Martinsville?

A. I am well acquainted with the grounds and fairly well acquainted with the facilities for loading and unloading cars.

Q. Are the grounds at that depot sufficient in your opinion to enable the railroad to accommodate the general public business of the town of Martinsville?

A. By no means.

Q. When was this railroad built to Martinsville?

A. It reached here in March, 1882, I think.

Q. Has the business of the town and the population grown to any extent from that time to this?

A. Very greatly indeed. As to business, it is many times greater, and the population, from two to three times as great.

Q. Are the public demands absolute for the extension of the facilities of this railway for doing the business of the town at that point?

A. They are.

142 Q. You are acquainted with the proposed line of extension, are you not?

A. I am.

Q. Do you know any other line of extension that will meet this public demand, without larger facilities, more conveniently than the proposed line?

A. None.

Cross-examination.

By Mr. HUNT:

Q. Are you in any wise connected with the Danville & Western Ry.?

A. In no wise whatever.

Q. Were you a former officer or director of the road?

A. No sir.

Q. Were you examined as a witness in the former proceeding for condemnation of the lands of Miss Ann M. Hairston?

A. I was, at some length.

Q. Was there a different line proposed to be condemned in that proceeding?

A. There was, in part, at least.

Q. Did you or not testify then that the line then proposed to be condemned would meet the demands of the public?

A. I think I did.

Q. Did you or not testify that that was the only line which could be located that would meet the demand of the public?

143 A. I don't think I did. It has been some time ago, and I don't remember distinctly, but I don't think I did, sir.

By Mr. STAPLES:

Q. Mr. Hall, who made this location and this map, has testified that the land which it is proposed to condemn will be almost entirely taken up by a 14 foot roadbed, and the slopes, fills and cuts, which are necessary in the construction, and that the only way to get a greater level space there would be putting in retaining walls, and thus do away with the usual slope, and that even by building retaining walls on the west side, the width of the roadway which would be

thus secured, would vary from 7 1/2 to 12 1/2 feet. Do you think that such a roadway as that would meet the situation here effectively?

A. I think it would be very much better than the facilities that they now have. A wider space for wagons would of course be more desirable, but in case it would be practicable to use even a 7 1/2 foot drive way for wagons rather than submit to the inconveniences they now have with the present arrangement.

Q. Then you think that a drive way varying in width from 7 1/2 to 12 1/2 feet for a length of over 500 feet would be a practicable means of access for the loading and unloading of cars, do you?

144 A. Not a desirable one, if better could be had, but it can be used in that way with safety and convenience.

Q. You think it could be used with safety and convenience?

A. Yes sir. The width of a wagon is about six feet I think. The width of a car is about eight feet. That would be from the center line 10 feet to the property line. That would leave a space of a foot or two between the car and the wagon without running the wheels entirely up to the property line.

Q. You think a roadway 7½ feet wide with a car on one side and a retaining wall on the other would be a practical advantage?

A. I do, over what facilities they have now.

Q. Do you think that any railroad company, Colonel, looking to the question of getting access to its cars would consider as a practicable scheme the building on a track and a roadway seven feet wide on the side of it for unloading cars, and that secured by an expensive retaining wall from 300 to 500 feet long?

A. I don't think such construction would be desirable by a railroad company, but it would be adopted and used rather than no facilities at all.

Q. Couldn't this railroad company, if it had seen *feet*, have widened that line at this point here for 20 feet more if it was seeking such facilities in good faith?

A. I think not, without taking ground less than 60 feet from the houses of the defendant in this cause.

145 Q. But doesn't the law provide that no track shall be put within 60 feet?

A. I haven't had occasion to examine the law in that respect. I think no ground shall be taken nearer than 60 feet is the language of the law.

Q. And you think then that when a railroad looking principally to furnishing the public access to its tracks locates its line so that it cannot possibly have a roadway greater than from 7½ to 12½ feet, that that location indicates that it was acting in good faith when it claims that it was seeking the public advantage and not merely to build the track?

A. I don't see that there was any reason to doubt such a purpose. I would add further that as shown by that map, by as much of this right of way between the railroad track and the property line of Miss Ann Hairston on the west, has it very much greater than 7½ feet, and that wagons need not necessarily stand upon the 7½

feet from the points at which the right of way is narrowest, but could merely pass over them and stop on the wider portions of the right of way.

Q. What do you estimate the wider portions to be?

A. I think it has been stated about 12 feet.

Q. Then do you think it is possible to use a wagon way open to the public only at one end, whose greatest width is 12½ feet, for the purpose of unloading cars—Is it possible?

A. I think it is.

146 Q. How would you get your wagons out of there after you got them in?

A. Well, the freight wagons and drays are usually of the pattern known as under-cut—they take a short space to turn around.

Q. Could you turn one of them in 12½ feet?

A. I can't state accurately on that point.

Q. What is the average length from the center of the front truck to the rear end of one of those dray wagons?

A. I couldn't state, sir.

Q. Isn't it at least seven feet?

A. Possibly it is.

Q. Isn't it at least 10 feet from the center of the front truck to the horse's front feet that are hitched to them?

A. I suppose something like that.

Q. Well then, how if the two parts of this wagon which must be, in order to turn it, extended in a straight line at some time at 17 feet; how are you going to turn that in a 12 foot roadway?

A. An arrangement could easily be made by which the wagon could pass on in the direction that it came to the track until it be past the cars, and then by throwing the horses on the railroad track, could turn in that way. It would not be desirable to do so, but it could be done, I think.

147 Q. It would be something like playing pigs in clover, or the 15-puzzle, wouldn't it?

A. I have never played that, that I know of, but I think this wagon could be turned on the railroad in the manner I have stated.

Q. Do you think that any railroad company would adopt that as a practicable scheme?

A. If they could do no better, and desired freight I think they would.

Q. If it was the only accessable track—the only accessable route, it might?

A. Yes, a better one would be desired, of course.

Q. But if it could find a right of way elsewhere by building, we will say, a roadway for a distance of 2 or 3 hundred feet, you would consider that a better scheme, would you not?

A. It might be if there was nothing else to be looked after but the simple fact of loading and unloading cars.

Q. Well, wouldn't the delay in all this shifting and getting behind the cars, and putting the horses on the track, and waiting for one wagon to pass another, and one wagon moving up for another to get to a car, wouldn't that be the cause of more loss of time and ex-

pense than it would be if those wagons were to go a thousand feet further where they had a good turning place?

147½ A. I don't know, Mr. Staples, I have had very little experience in driving wagons, and I don't know.

Q. You are an engineer, I believe?

A. I am a practical civil engineer.

Q. And I believe such things come within the province of an engineer?

A. They are supposed to know a little of everything, I believe, sir.

Q. And you think if you were locating such a yard for a railroad company, you would prefer a roadway varying from 7 to 12 feet over one that had any practicable desirable width, if the narrow one was 1,000 feet nearer than the broader one?

A. If thereby I could secure a considerable amount of business for my road, I unquestionably would.

Q. You mean if at the same time you were furnishing the public, you could go to some big corporation?

A. I would prefer going to a big corporation than a small one for freight.

The COURT: What is the width of this right of way at the point that touches Fontaine street?

Judge GREENE: 40 feet, sir, where it abuts on Fontaine street.

By the COURT:

Q. What is the difficulty of making the track level on this wider space—right of way, rather?

148 A. It would get too near the dwelling houses on Miss Hairston's ground. The ground makes very abruptly from this location, and would necessitate an undesirable curve, I have been over the ground and noticed it.

Q. I understand the right of way for 500 feet along there is level?

A. It can be made level.

Q. What is the difficulty in the way of putting the track itself immediately in the center of the right of way, and thus giving a greater width to the western side of the track?

A. The eastern side is the one that jumps off.

Q. Is there any difficulty about that?

A. It would require considerable filling, and the location of the road on made earths instead of firm ground.

Q. Well, that is continually done?

A. That may perhaps be the policy of these railroad people; I don't know what their policy is; it may be to put the track wherever they please on this right of way, and that may be a matter for them to decide.

Mr. STAPLES: They located the line on the map.

The COURT: What is the width of this 500 feet?

WITNESS: 40 feet, sir.

149 The COURT: Do you know, Col. Bryant, as a result of your knowledge of this ground here, any difficulty in putting the

track more to the eastern side of the right of way, and thus allowing a larger amount of team track space on the western side of the railroad?

(The defendant objects to the consideration of this question, and to its incorporation in the record, upon the ground that the petitioner has located the center line of its track as the principal object and purpose of this condemnation, and the engineer of the company has testified that the eastern limits of the lands sought to be condemned practically define the foot of the slopes on an embankment which would be required for a track located as the center line as projected upon the map, and such testimony binds the petitioner.)

By the COURT:

Q. Are there any slopes along this 500 feet of level ground?

A. Yes, there is a slope to the east. I was about to answer your question, that the only serious objection to putting the track nearer the eastern property line and further from the western property line, would seem to be a slight increase in the curvature of the line nearer the main track.

Q. Even then the curvature on that portion of it would not be anything like as great as indicated by the map where it comes away from the depot.

150 A. It is a continuation of the same curve, I think.

Q. To throw the track along there 10 feet further to the east, would it or not result in making the curvature at that point dangerous for such purposes as the road would be contemplated to be used for?

A. I might state that curves of any degree are usually endeavored to be avoided by engineers in locating railroad lines, and the lighter the curve the more desirable would be the location, but by putting this track between stations 5 and 10, 10 feet or even more to the eastward would not render the curve from the main line to station 6+32 at all dangerous.

Q. You say the objection to curves principally applies to where trains would be run at some speed, and not where it would be used for purposes of loading and unloading cars.

A. On spur tracks they do not enter very largely into the consideration. As much as a 40 degree curve is allowed in some instances, on spur tracks.

By Mr. STAPLES: Not waiving the objection heretofore made with reference to this line of examination, counsel for defendant asks the witness the following questions:—

Q. By an extension of the curve it would not be possible to shift the track for any given distance the same along its entire length, but a tangent would be starting with nothing at the point of curve and gradually increased to the maximum change at the end

151 of the tangent, wouldn't it?

A. No sir, I do not so understand it.

Q. How much change in the lateral position of a track is it possible to make at a point of tangent by increasing the curve?

A. A curve and tangent,—the rules are fixed for drawing them, and there can be no such thing as shifting.

Q. So that your change in the lateral position of the track at a point of tangent is nothing, and greatly increases as you depart on the new curve?

A. My suggestion was not that.

Q. What was your suggestion?

A. That the tangent point be placed further to the south, or between stations 4 and 5, and the curvature from the main line to this tangent point adjusted to accommodate it.

Q. What is a tangent?

A. A straight line.

Q. Well, can you have any curvature on a straight line?

A. I never heard of such a thing.

Q. Then how can you adjust a tangent to a curve?

A. I stated adjust the curve to the tangent.

Q. As I understand your suggestion, Colonel, it is that you would go upon the ground at a point a desirable distance east of the present tangent and locate a tangent parallel to it as far south as
152 you wanted it, or as practicable, and then connect that with the main track by whatever curve was necessary?

A. That is what I said.

Q. Would not that Colonel, necessarily throw the center line at a point 3+75 further to the east?

A. It would, according to the distance that the tangent line was removed from its present location.

Q. Don't you know as a fact that the ground to the east opposite that point, 3+70, falls off at a slope of something like one to one.—Doesn't this ground at this point fall, off to the east or to the right of the track at a slope of one to one?

A. About that.

Q. Then if you shifted your track here to the east, wouldn't you be shifting the foot of your embankment at a rate of about three or four to one?

A. It would only be a question of one to one, that would be I should say 7½ feet further down yonder.

Q. Did you ever set any slope-stakes on a railroad?

A. I have. I was speaking of this piece of ground with which I am quite familiar, and gave my information in regard to that, and not as to the work of slope staking generally. That is well defined by rules that all engineers observe in doing the work.

153 Q. Now, Colonel, if the point "C" on this sketch representing the foot of the embankment 15 feet wide on a slope of 6½ feet to one, stops where the natural slope of the ground is one to one—this is purely a hypothetical question—and you shift the point "B" five feet to the point "E" on a slope of 1½ to one to strike the ground, would it not be on the other side of the ravine, if that sketch is correct?

A. It would not be on the other side of the ravine.

Q. Show me where it would strike the ground there?

A. I am not prepared to adopt your map.

Q. I don't ask you to adopt my map. I have got a right to a categorical answer to my hypothetical question?

A. Well, I am not prepared to adopt your map as drawn roughly; I may say that a pencil and scaling apparatus is a guide to ascertain the correct answer to your question.

Q. I will put my question this way, then: Taking it for granted that the point 13 on the petitioner's map is the foot of a slope 1½ to one for a 15 foot embankment, on a track as located. Taking that for granted And taking it further for granted that the ground from the point "C" to the foot of the ravine falls off at a slope of one to one. When you shift the center line of the track five feet toward the foot of that embankment, would it strike that slope on the same side of the ravine?

A. If the earth——

154 Q. I don't want any "ifs," Colonel. I say if it would strike it on this side of the ravine?

A. I don't think it would. It is nothing more than a sharp gulley as shown upon the profile.

Q. Still, the water down there has to be taken care of?

A. Yes sir.

Witness stands aside.

155 Mr. P. Rucker.

Examined by Judge Greene:

Q. Mr. Rucker, where do you reside?

A. Martinsville, Virginia.

Q. Are you the president of the Rucker & Witten Tobacco Company?

A. Yes sir.

Q. Will you please state how long you have been residing in this town?

A. About 15 years.

Q. What business is the Rucker & Witten Tobacco company engaged in?

A. The manufacture of tobacco.

Q. Does this necessarily constantly throw you into business relations with the Danville & Western Ry. Company?

A. Yes sir.

Q. Are you acquainted with the station grounds at Martinsville of this company, with the facilities of those grounds for receiving and shipping freight?

A. I am from a shipper's standpoint and a citizen's standpoint.

Q. Please state whether in your opinion they are sufficient to conveniently or properly meet the demands of the business at Martinsville?

156 A. I do not think that they are.

Q. Has the business of Martinsville and its population grown to any extent within the last few years?

A. Very materially, sir.

Q. Is it your opinion that it is still growing or decreasing?

A. Still increasing and growing.

Q. Are you of opinion that it is necessary for the Danville & Western Ry. Company to secure larger terminal facilities in order to enable it to do its business?

A. Yes sir.

Q. Would it be necessary in order for that company to do this that they acquire other lines in and around or near the depot, the present depot?

A. I consider it so.

Q. You are acquainted with the line of the proposed extension for which the condemnation proceedings now here are instituted, are you?

A. I have some little knowledge of it; not accurate or definite by any means, though.

Q. In your opinion is that a feasible and proper line to be adopted for securing facilities?

A. As an ordinary man, not being a civil engineer, it appears to me to be entirely feasible and practicable.

Q. If that line is adopted and a track constructed upon it, will it be generally convenient and beneficial for public use, in your opinion?

157 A. Yes sir, that is one of the main objects of the railway company, I understand, is to accommodate the general public and increase their terminal facilities, to give them a capacity to do so.

Judge GREENE: If your Honor please, I do not care to examine Mr. Rucker myself on the question of that contract. If the gentlemen wish to examine him, they can. I stated to your Honor that the contract would be in court. I have a copy of it certified by Mr. Rucker. I stated that I supposed he had a signed copy of it, but it has not been returned to him. The contract was drawn by me under the directions of Major Andrews, the president of the Danville & Western, and sent Mr. Rucker. He executed it and kept an accurate copy of it, and it was returned to Major Andrews in order that he might execute it on the part of the railroad and return it to the Rucker & Witten Company; that is, it was to be executed in duplicate, and he has not yet returned it. Here is an exact copy of the contract, however, that Mr. Rucker has certified, and has examined it and read it over with the original contract, and my own memory is that that is the contract as it was drawn.

Mr. STAPLES: If your Honor please, we object to this contract on the ground that it was made after these proceedings were instituted.

158 Judge GREENE: It was reduced to writing afterwards. It is the only contract we have in regard to it. There was a verbal contract, an understanding between these people that such a contract would be entered into, and it was accordingly done.

Mr. STAPLES: If your Honor please, this contract is dated ten days after the institution of these proceedings, and unless it is stated that it is a contract subsequently reduced to writing——

Judge GREENE: I state that. If the gentlemen want to produce it in evidence, I have no objection. They may use it if they think proper.

Cross-examination.

By Mr. STAPLES:

Q. Mr. Rucker, is this the only contract that is now in force between you and your company and the Danville and Western Railway Company?

A. Yes sir.

Q. There is no collateral agreement of any kind with respect to this contract other than contained in this contract?

A. No sir.

Q. What other contracts have you entered into with the Danville & Western Railway Company in reference to a contract with the Rucker & Witten Company?

159 A. I stated just now, Mr. Staples, that that was the only agreement of any kind that I had with the Danville & Western Railway company.

Q. I was asking if sometime ago there was not another contract with regard to a spur track to your factory. I do not mean necessarily this same spur track.

A. We had an agreement with them about the other case, the first case. That was going down Franklin street.

Q. Where is that contract?

A. Destroyed.

Q. Did you not retain a copy of it?

A. No sir.

Q. When was it destroyed?

A. Some time ago, I suppose. I don't remember the exact date when the railroad company decided to abandon that road.

Q. Do you know whether the copy retained by the company was ever destroyed?

A. I do not know, sir.

Q. When was that first contract entered into Mr. Rucker?

A. I don't remember.

Q. Give us approximately the date, please sir?

A. Some time about the time that the original suit was instituted.

Q. About September, 1902?

A. I suppose so.

160 Q. When were the first negotiations opened between yourself, or your tobacco company, and this railroad company with reference to the spur track?

A. Some time prior to the proceedings.

Q. Some time in the spring or summer of 1902?

A. Yes sir. It wouldn't go back that far, would it?

Q. I think it was 1902, or 1903.

A. Well, I wouldn't specify a date, but I don't think 1902 is correct.

Q. Who was the first person that broached this question to the

other—did the railroad company come to you, or did you go to the railroad company?

A. Capt. White approached me on the subject.

Q. Then before Capt. White approached you with reference to making such a contract you had never approached the railroad company with reference to putting a spur track in there?

A. We had frequently talked about the matter of a spur track with both railroads at various points.

Q. Is it not a fact, Mr. Rucker, that with reference to a spur track on the Danville & Western railroad to your factory you first approached or sent some emis-ary or agent to the company?

A. In connection with this present road?

Q. I am speaking of any spur track to your factory?

A. Not in connection with our present factories, no sir.

161 Q. I am not speaking of your present location; I am speaking of was it not the project of connecting a factory to be owned or maintained by the Rucker & Witten Tobacco Company, with the Danville & Western railroad, first broached by yourself, or one of your agents?

A. The present route, as stated by me, I was approached on that by Capt. White. I also stated that we had previously figured on other locations and other routes different from this one, and I don't know who approached the railroads first, whether they approached us or we approached them. We once had under consideration the matter of buying five or six acres of land over here on the other side of town, and we were then in negotiations with the Norfolk and Western. I do not know whether they approached us or we approached them. We also had under advisement the entire purchase of this big place down here from Lester's just south of the present main line of the Danville & Western, and I don't remember, but I think perhaps we approached the railroad company first on that location ourselves, to know if they would put in the sidetrack there, which was parallel to their present main line, and they had it surveyed and reported that it was impracticable, and abandoned that project, and when we found that we could not get any railroad facilities there, of course we abandoned that.

162 Q. Now as I understand you, you have had in view two sites for your factory in this vicinity here, have you not?

A. One down in this direction (indicating), and another over north of here.

Q. You have had in view then only one site for the factory on Franklin street?

A. Yes sir.

Q. When did you first acquire your rights—I don't mean by purchase—I mean by purchase, option or contract, for the lands on Franklin street on which you proposed to erect your factory?

A. I couldn't answer that, I don't remember, for the reason that it was owned by different property owners, and we bought it after ascertaining that the other property wasn't practicable. We got it piece at a time.

Q. Give me about the date of your first purchase or contract?

A. I wouldn't undertake to do that from memory. I will send to the office for the deeds.

Q. Wasn't it six months or more prior to the institution of the first proceedings?

A. I can't say whether we purchased down there or not prior, but we ascertained that we could do so.

Q. Then you are not prepared to say whether you had determined upon that location, or begun to purchase or contract for it— The question of a track put there not by the road, but I mean by any road, was first broached by you or the company you can't say
163 which of you first——

A. I said just now that the company first approached us on the subject. We had up the matter of this other location down here, and the company decided that that would be too expensive to get any trackage, and it would render it impracticable, and they then suggested that they could get in trackage that would be a good and feasible track this other way.

Q. Then your suggestion that they could secure a track here was following your suggestion that they build you a spur track down yonder?

A. No sir, I don't grant that at all.

Q. I am not asking you to grant anything at all.

A. Well, I won't agree to make such a statement as that. That is what I meant by that expression. The thing originated in this way: The whole community here was having lots of trouble in regard to carloads of shipments and shipments generally, and I was after Capt. White in regard to it, and he said that it was doing the best it could, that the company didn't have trackage here to handle the cars, and that he hoped to do better, and we would have to be patient. That he wanted to get additional facilities here, and then he mentioned that he had heard that we anticipated building, and wanted to know if he could get additional trackage facilities and so forth for the handling of the business and of the general public here, and switching his trains and handling that business, would it be possible for us
164 to build our new buildings and equipment on that new proposed line, that he needed to run for the general public, and I told him that I thought it would.

Q. Then pursuant to these negotiations you attempted a location to the east of the present depot, did you?

A. Yes sir.

Q. You attempted to purchase from Mr. Lester?

A. Yes sir.

Q. But you could not purchase from him, or make satisfactory arrangements down there?

A. Didn't try to do it after the railroad stated that it was so very costly and unsatisfactory to get railroad trackage there, that it would be with such a sweeping grade that it would not serve their purpose for the general public, and for general dray trackage, and they didn't care to adopt that route or place for these reasons, and desired to get something better.

Q. Then, Mr. Rucker, how far from the present depot was that location which you first considered?

A. It starts in very close to the present depot. Just across the street.

Q. Did cross Bullington's Gulley?

A. It included Bullington's Gulley.

Q. What street did it front on?

A. That railroad street, if it is a street. I don't know whether that is a street or not.

165 Q. Didn't it extend as far as Lester's street—your proposed location?

A. Yes sir, it took in that whole square.

Q. And the reason that you did not decide upon that was that it was not practicable from the point of view of grade and curvature?

A. Yes sir. I would like to supplement that statement a little, and also say that the railroad stated that they could not get in a satisfactory track there on account of grade, to use as a general dray track.

Q. I understood you to say that.

A. And it would have been exactly the same as the Tabernacle track; it was the sweeping grade that they are trying to get away from.

Q. Mr. Rucker, there is a tract of land here immediately north of the land of Miss Ann Hairston, which is marked on this map as Rucker & Witten Tobacco Company. How does the Rucker & Witten Company hold that, by deed or contract, or how; in other words, who is the owner of that property?

A. The Rucker & Witten company bought it by deed and paid for it.

Q. Has the Rucker & Witten Tobacco company conveyed it to anyone?

A. No, further than that contract calls for. The contract calls for a deed of conveyance.

Q. But you haven't conveyed it?

166 A. The deed has not been drawn as yet, and recorded, but it is as good as done, for that contract calls for it.

Q. I am not speaking of the railroad company; I am speaking of any other person?

A. I think not, sir; I can't recall that we have.

Q. I mean by you, your company?

A. I understand.

By Mr. CARTER:

Q. Where is Fontaine Street?

A. It runs in a northeasterly direction, a little to the north out there, just beyond or north of what is known as the Hodnett Factory.

Q. Who owns that factory?

A. The Rucker & Witten Tobacco Company.

Q. How far is it from the factory to the shipping room that you have already erected?

A. It is 50 feet, I believe, Mr. Carter.

By the COURT:

Q. Does the land end at Fontaine street?

A. No sir; it crosses Fontaine street and goes beyond Fontaine

street, and that is where the Rucker & Witten Tobacco Company will use the tracks exclusively and from Fontaine street back this way is where the general public will use it, and the Rucker & Witten Tobacco Company not at all.

167 Q. From Fontaine street back to the depot, can that 1½ per cent. grade by which it approaches Fontaine street, be eliminated?

A. Well, yes sir, that grade can be raised sufficiently to put in 300 feet of level grade there.

The COURT: From Fontaine street back towards the present station of the Danville & Western they can get team track facilities with a width of twenty feet from the center of the track along there.

(Counsel for defendant moves the court to exclude from the record all questions relating to any extension of the proposed line, or any modification; especially from that regularly adopted by the resolution of the board of directors of the petitioner, and any statement of the witness, Mr. Rucker, as to the intentions of the company, it not appearing from his evidence that he is authorized to speak for petitioner.)

The COURT: I understand that the ground of objection to the building of this road as proposed to reach this factory on the other side of Fontaine street——

Mr. STAPLES: Our proposition is, if your Honor, please, that this proposed line and the uses to which it is to be put, can only be the subject of inquiry so far as it has been authorized and adopted by the board of directors. What that is, we will come to argue to the court when the question of the evidence is considered.

168 The COURT: I will just ask this question: Where is the Rucker & Witten factory that has been spoken of in the evidence heretofore given in this case. Where is it located?

WITNESS: The new buildings are all to be on the other or north side of Fontaine street. We at present have one small building on the south side which would only be used for offices, but the tobacco houses, storage and manufacturing, will be on the north side of Fontaine street. There is where the Rucker & Witten Tobacco company will use the extended tracks, and not this side of Fontaine street.

Mr. STAPLES: I desire to ask Major Parker one more question in order to lay the foundation for an objection. Major Parker, I notice that the resolution of your board of directors refers to a plat. Is this the plat that was under consideration by the board of directors?

Major PARKER: Yes sir.

Mr. STAPLES: Now, if your Honor pleass, we desire to move the court to exclude from its consideration and the record, any questions or evidence relating to any extension of the proposed track beyond such as is indicated upon the map, which has embodied in it, and limits, the effect of the resolution of the board of directors of the petitioner. Upon that map is shown the *the* Rucker & Witten property, and that property, according to the resolution of the board of directors, is the terminus of the authorized track,

169

and the purposes of any extension and uses to which it is to be put cannot affect these proceedings.

Motion over-ruled: exception by defendant.

(Leave is given to file the resolution of the directors of the petitioner, showing to what extent they propose to extend its lines through the lands of the Rucker & Witten Tobacco Company in conformity with the agreement which has been filed in this cause.)

The defendant excepts to the ruling of the court as therein given, upon the grounds (1) that the said leave was not asked for by the petitioner, and (2) that the rights of the petitioner are to be determined as of the date of the institution of these proceedings.

(Judge Greene here offered in evidence (which were admitted by defendant) charter of the Danville & New River Railroad, and deed of Berryman Greene, Commissioner of the circuit court of the United States, to J. Wilcox Brown, which was offered in the former proceedings, by which the Danville & New River railroad was sold under foreclosure proceedings, and conveyed to the Danville & Western railway company.)

170 The charter of the Danville & New River railroad, with all amendments thereof, for the benefit of the said Danville & New River railroad, or its successor the Danville & Western railway, are considered as filed in evidence, and it is admitted by counsel that the Danville & Western railway company is successor of the rights and privileges of the Danville & New River railroad company.

The defendant offers in evidence the printed record in the former proceeding, now pending in the Supreme Court of Appeals of Virginia, with the understanding that so much thereof as is relevant and is desired by either party hereto, shall be considered in evidence on this issue.

(Neither party desiring to offer other evidence the case was submitted to the court.)

171 And the court certified that the exceptions noted in the foregoing transcript of the evidence were made and saved to the defendant at the time and in the manner as therein appearing, and that the foregoing evidence was all of the evidence offered by the petitioner in support of its said motion, and that the defendant offered no evidence other than the printed record of the former proceedings herein referred to on page 91 in opposition to said motion and the Court having considered the matters of law and fact arising upon said motion sustained the same and appointed five (5) commissioners for the purpose in the said petition requested, to which ruling of the court in appointing the said commissioners, and to the several rulings of the court in over-ruling the objections of the defendants to the evidence offered by the petitioner, as in the transcript above set forth, the defendant excepted, and tenders this her bill of exception No. 2, and prays that the same may be signed, sealed, saved to her and made a part of the record in this case, which is accordingly done this 18th day of March, 1905.

E. W. SAUNDERS, *Judge.* [SEAL.]

172 In the Circuit Court for the County of Henry, Virginia.

THE DANVILLE & WESTERN RAILWAY COMPANY
vs.
ANN M. HAIRSTON.

Bill of Exception No. 3.

Be it known that upon the hearing of this cause and after the Court had sustained the motion of the petitioner for the appointment of commissioners, and had sustained the same, the defendant asked the Court to give the said commissioner the following three (3) instructions:—

Instruction No. 1.

Inasmuch as on the hearing of this motion, the evidence of the petitioner, the Railway Company, tends to show that one of its purposes in condemning the lands of the defendant, is the construction of a driveway along the west side thereof, the commissioners are instructed that in estimating the benefits if any, to the property of the defendant on the west side of said track not taken in said proceedings, they shall not consider any benefits to be derived to said property from the proximity to said proposed track.

Instruction No. 2.

The commissioners are instructed that they shall report separately to the court the three several items (1st) the value of the land of the defendant sought to be condemned; (2nd) the damage to the remaining property resulting from the taking of said proposed area; and (3rd) the damage to the remaining property from the construction of the proposed track and the roadway therefor.

Instruction No. 3.

173 The commissioners are further instructed that they shall also report their estimate of the value of any benefits which will accrue to the remaining property of the defendant by the existence of the said track; but in considering such benefits they shall consider that it is within the power and the probable purpose of the petitioner to isolate the land on the west of the track belonging to the defendant from immediate access to said track, and they shall consider no benefits which this defendant will derive in common with other people and other citizens of the town of Martinsville, but only such benefits as are derived by her exclusive of all other persons.

Which instructions the Court refused to give and to which ruling of the Court the defendant excepted, but in lieu thereof the Court gave of its own motion the three (3) following instructions:—

Court's Instructions No. 1.

The commissioners are instructed that they shall report separately to the Court as three several items (1st) the value of the land of the defendant sought to be condemned; (2nd) the damage to the remaining property resulting from the taking of said proposed area, and the construction thereon of the proposed track and the roadway therefor; (3rd) the value of the peculiar benefits to said remaining property resulting from the construction of the proposed track and the roadway therefor on said area.

Court Instruction No. 2.

The court instructs the commissioners further that in determining the peculiar benefit to the remaining property of the defendant from the construction of the proposed work, they may consider
174 that it is within the power and probable purpose of petitioner to establish a roadway for the benefit of the public, on the proposed right of way, between the track on the same, and the land of the defendant on the west side of said right of way.

Court Instruction No. 3.

The commissioners are further instructed that in estimating the benefits to the remaining lands of the defendants, they are to consider no benefits which said defendant will derive in common with other people and citizens of the town of Martinsville from the construction of the proposed work, but only such benefits as will accrue peculiarly to the remaining property of said defendant as compared with the property of other citizens in said town.

To the giving of which instructions the defendant then and there excepted, and the defendant tenders this her bill of exception No. 3, and asks that the same may be signed, sealed, saved to her and made a part of the record in this case, which is accordingly done, this 18th day of March, 1905.

E. W. SAUNDERS, *Judge*. [SEAL.]

175 In the Circuit Court for the County of Henry, Virginia.

THE DANVILLE & WESTERN RAILWAY COMPANY
vs.
ANN M. HAIRSTON.

Defendant's Bill of Exception No. 4.

Be it known that upon the hearing of this cause upon the issue raised by the petition and answer, counsel for the petitioner asked of a witness, Theodore Parker, the following questions:

Q. "Will the line which you have selected and which is proposed to be adopted carry you to any other street in the town of Martins-

ville? Which question appears on page 11 and is repeated on page 12 of the defendant's bill of exception No. 2, and on page 87 the question was asked by the Court,

"Does the line end at Fontaine Street," as appears on page 87 of the same, and by the Court the question was asked

"From Fontaine Street back to the depot? Can that 1½% grade by which it approaches Fontaine Street, be eliminated," which appears on page 88 of the same, and by the Court the following question was asked,

"I will just ask this question: where is the Rucker & Witten Factory that has been spoken of in the evidence heretofore given in this case, Where is it located?"

As appearing on page 89 of the same, To the asking of each of which questions and the consideration of the answers given thereto the defendant by counsel, at the time each of said questions *were*

176 asked, objected on the ground that the resolution of the Board of Directors of the petitioner and the plat referred to therein fixed and defined the object and purposes of this condemnation, and that any testimony as to the intention of the petitioner not embodied in said resolution was improper, all of which objections the Court over-ruled, to which ruling of the Court the defendant in each instance then and there excepted. Whereupon the said defendant presents this her bill of exceptions No. 4 to the said several rulings of the Court and prays that the same may be signed, sealed, saved to her and made a part of the record in this case, which is accordingly done, this the 18th day of March, 1905.

E. W. SAUNDERS, *Judge*. [SEAL.]

177 In the Circuit Court for the County of Henry, Virginia.

THE DANVILLE & WESTERN RAILWAY COMPANY
vs.
ANN M. HAIRSTON.

Defendant's Bill of Exception No. 5.

#5.

Be it known that upon the hearing of this cause upon the issue raised by the petition and answer the court asked of a witness the following question:

"Do you know Col. Bryant? As a result of your knowledge of this ground here any difficulty in putting the track more to the eastern side of the right of way, and thus allowing a larger amount of team track, on the western side of the Railroad." which question appears on page 70 of the defendant's bill of exception No. 2. followed by several questions of the Court in the same connection, to the asking of which the defendant by counsel objected upon the ground that the petitioner had located the center line of its track as the princip*le* object and purpose of this condemnation, and that the Engineer of the Company had testified that the eastern limits

of the land sought to be condemned practically defined the foot of the slopes on an embankment which would have been required for a track located at the center line as projected upon the map, and such testimony was binding upon the petitioner, which objects the Court over-ruled, to which ruling of the Court the defendant then and there excepted and tenders this her bill of exceptions No. 5, and prays that the same be signed, sealed, saved to her and made a part of the record in this case, which is accordingly done, this the 18th day of March, 1905.

E. W. SAUNDERS, *Judge.* [SEAL.]

178 *Oath of Commissioners.*

DANVILLE & WESTERN RAILWAY COMPANY
vs.
ANN M. HAIRSTON.

STATE OF VIRGINIA, *County of Henry, To-wit:*

I, J. H. Matthews, a clerk of the Circuit Court for the County aforesaid do certify that G. B. Dudley, J. D. Sparrow, P. P. Watson, T. G. Burch and S. D. English have this day made oath before me that they will faithfully and impartially ascertain what will be a just compensation for a fee simple interest and title in and to such land, of the freehold whereof Ann M. Hairston, is tenant, and for such other property as is proposed to be taken by the Danville & Western Railway Company for its purposes, and award the damages, if any resulting to the adjacent and other property of any other person, beyond the peculiar benefits that will accrue to such properties, respectively, from the construction and operation of the Company's works, and will truly certify the same. Given under my hand this 28th day of January 1905.

J. H. MATTHEWS, *Clerk.*

The report of the Commissioners — in words and figures following:

Report of Commissioners.

DANVILLE & WESTERN RAILWAY COMPANY
vs.
ANN M. HAIRSTON.

We, G. B. Dudley, J. D. Sparrow, P. P. Watson, T. G. Burch and S. D. English, commissioners appointed by the Circuit Court of the County of Henry, to ascertain what will be a just compensation for a fee simple interest and title in and to such land, of the
179 freehold whereof, Ann M. Hairston is tenant, and for such other property as is proposed to be taken by the Danville & Western Railway Company, and to assess the damages, if any, resulting to the adjacent or other property of said tenant or owner, or

to the property of any other person, beyond the peculiar benefits that will accrue to such properties, respectively, from the construction and operation of the company's works, do certify that on the 28th day of January 1905, at twelve o'clock Noon, the day designated in the said order, we met together, on the said part of the land, the limits of which part were then and there described to us as follows, to wit: The fee simple interest and title in and to the following described land:

"Beginning at Miss Ann M. Hairston's Corner with Henry C. Lester, on the North side of the Danville & Western Railway and 78 feet North of the center of its main line near Martinsville Depot:

Thence South 60° W. 60 feet to a stake (1).
Thence North 10° W. 102 feet to a stake (2).
Thence N. 70 W. 30 feet to a stake (3).
Thence North 30 W. 60 feet to a stake (4).
Thence N. 10 W. 80 feet to a stake (5).
Thence North 8° 30′ E. 150 feet to a stake (6).
Thence North 11° E. 150 feet to a stake (7).
Thence North 8° 30′ E. 137 feet to a stake (8).
Thence North 56° 45′ E. 100 feet to a stake (9).
Thence South 19° 30′ W. 124 feet to a stake (10).
Thence South 8° 30′ W. 108.5 feet to a stake (11).
Thence South 12° 15′ W. 194 feet to a stake (12).
Thence South 26° 15′ E. 136 feet to a stake (13).
Thence South 14° 30′ E. 140 feet to a stake at point of beginning, and containing 1.03 acres, more or less," of which said lot a plot or survey is filed in this proceedings; and, after being duly sworn, upon a view of the part aforesaid, and of the adjacent and other property of said owner, and of the property of other persons who will be damaged in their property by the construction and operation of the works of said Company; and upon such evidence as was before us, we are of the opinion, and do ascertain, that for the said fee simple interest and title in and to the property above
180 described and for other property so taken $650.00, (six hundred and fifty dollors) will be a just compensation, and the damage: to the adjacent and other property of said tenant or owner, and to the property of other persons, who will be damaged in their property by reason of the construction and operation of the works of said company, beyond the peculiar benefits that will accrue to such properties, respectively, from the construction and operation of such works are to Miss Ann Hairston nothing, the commissioners further ascertaining and reporting under the instructions of the Court, the damage to the adjacent property of the said Ann M. Hairston from the construction and operation of the works of said company, to be $200.00, (two hundred dollars) and ascertaining and reporting that the peculiar benefits that will accrue to the adjacent and other property of the said Ann M. Hairston from the construction and operation of the works of said Company to be $2200.00, (twenty two hundred dollars) And we further ascertain and report that there are no damages to the property of any person other than the said Ann M. Hairston by reason of the construction

and operation of the works of said Company. Made this 28 day of January 1905.

G. B. DUDLEY,
J. D. SPARROW,
P. P. WATSON,
T. G. BURCH,
S. D. ENGLISH,
Commissioners.

Commissioners' fees $3.00 each.

1905, Jan'y 28th filed with oath of commissioners attached.

J. H. MATTHEWS, *Clerk.*

181 DANVILLE & WESTERN RAILWAY CO.
vs.
ANN M. HAIRSTON.

This day came the defendant Ann M. Hairston by counsel and excepted to the report of the commissioners heretofore filed herein and as grounds for her exceptions, says first, that the sum reported by said commissioners as a compensation for the taking of the land proposed to be condemned is wholly inadequate, second, that the sum of $200.00, reported by the said commissioners for the damage to the adjacent property is wholly inadequate, third, that the sum of $2200.00, reported by the commissioners as the peculiar benefits to accrue to the adjacent lands of the defendant by reason of the construction of the proposed work, was wholly excessive and unwarranted. And the said defendant moved that the said report should not be confirmed but that the same should be over-ruled and quashed.

ANN M. HAIRSTON.

JNO. W. CARTER,
HUNT & STAPLES, *p. q.*

182 In the Circuit Court for the County of Henry, Virginia, 10th April, 1905.

THE DANVILLE & WESTERN RAILWAY COMPANY
vs.
ANN M. HAIRSTON.

This day came the petitioner by its attorney and moved the Court for a confirmation of the report of the commissioners in this cause, to which the defendant by counsel objected and the said defendant moved the Court for judgment in this cause upon the ground

First, That the Court should have entered judgment for the defendant upon her special plea herein and

Second, That the Court erred in the appointment of the Commissioners and in ascertaining and ordering that the petitioner had the right to condemn the lands of the defendant, which motion has to

both of said grounds, the Court over-ruled, to which ruling of the Court the defendant then and there excepted.

Whereupon the defendant tendered in writing her objections and exceptions — the report of the Commissioners herein, which are ordered filed, and there upon presented to the Court evidence in support of the same in response to which the petitioner presented evidence in support of the said report, which evidence is embodied in the defendant's bill of exception No. 6, and the matters of law and fact thereon arising having been submitted to the Court and fully argued by counsel, and the Court finding that the report of the said Commissioners was in due and proper form, and that the said Commissioners had taken the proper oath before the Clerk of this
183 Court before entering upon their duties as such, and that the said report has been filed in the Clerk's Office of this Court for more than sixty (60) days prior to the beginning of this term of the Court, and the Court being of the opinion that the report of the said Commissioners was fair and just is of the opinion to and doth confirm the same and the said report is ordered to be recorded, and leave is hereby given to the petitioner to pay into Court the sum of $650.00, *which is accordingly done*, and thereupon subject to the suspending order herein, it is ordered that a fee simple interest in and to the land described in the petition and exhibits be and the same is hereby vested in the said petitioner, to which ruling and order of the Court the defendant then and there excepted, whereupon the defendant moved the Court as a condition precedent to the enjoyment of any of the rights herein adju-ged to the petitioner, that the said petitioner should be required to pay the defendant the cost in this and the Appellate Court of the former proceedings referred to in the defendant's special plea herein, which motion the Court over-ruled, to which ruling of the Court the defendant then and there excepted.

Whereupon the defendant moved the Court to require the petitioner to pay into Court the sum of $850.00 instead of the sum of $650.00 as aforesaid, the additional of $200.00 being the sum estimated by the Commissioners as the damage to the adjacent lands of the defendant, which motion the Court over-ruled, to which ruling of the Court the defendant then and there excepted.

And the defendant having declared her intention to apply
184 for a writ of error and supersedeas, to this order and judgment it is ordered that this judgment shall be suspended for a period of thirty (30) days, and that the said petitioner shall not within said period exercise any rights whatsoever under these proceedings, or the terms of this order. And it is ordered that the petitioner shall pay the costs of this proceedings.

185 In the Circuit Court for the County of Henry, Va.

D[illegible]VILLE & WESTERN RAILWAY CO.
vs.
ANN M. HAIRSTON.

Defendant's Bill of Exception #6.

Be it known that upon the calling of this cause for action upon the report of the commissioners heretofore appointed and the exceptions and objections of the defendant thereto, the defendant in support of her objections and exceptions offered the following evidence.

WATT HAIRSTON, a witness of lawful age, being duly sworn testified that he was the nephew of the defendant Ann M. Hairston, and one of the two persons, to whom *she* was empowered by the will of her father, deceased *the* devise the lands in question after her life estate therein: That he was acquainted with the property in question and the value thereof, that the sum of $650.00 was by no means an adequate compensation for the taking of the lands sought to be condemned, that *he* believed that that portion of the property shown upon the map in evidence, fronting 50 ft. on Franklin St. and fronting 60 ft. on the present line of the Danville & Western Railway Co.'s track the same lots being in the shape of an "L" had the market value of $2000.00 and that the portion of said lot, remaining after the taking of that part thereof sought to be condemned therein, would not exceed in value the sum of $1000.00; that the portion of the land of the defendant, East of the proposed tract would be entirely isolated from any access thereto by the defendant either from a public thoroughfare or from her own land, except by crossing the proposed track and the damage by reason of this isolation and the construction of said line as proposed would exceed the sum of $200.00 and
186 that no benefit would accrue to said Eastern portion of said land from the proposed line. That that portion of the land of the defendant appearing upon said map as North of the Alliance Warehouse and West of the proposed railway line would have its drainage intercepted and unless the same was properly provided for, that a good portion of said lots would be a low basin for the accumulation of water, and that the damage by reason thereof would exceed the sum of $200.00 and that it would cost more than the sum of $200.00 to fill the same to prevent the accumulation of water and that the same would not be benefited by the proposed line. That he as the agent of the defendant received an offer of $40.00 per month rent for a building to be erected upon a portion of the lands of the defendants West of the proposed line, said building to be 48 x 85 ft. fronting on Franklin St. and the cost not exceeding $2000.00, but that the said offer was made since the institution of these condemnation proceedings.

BEN TOWNES, a witness of lawful age, being duly sworn, testified that he was the agent for the defendant, was acquainted with the property in question and believed that the lots in the shape of an "L" fronting 50 ft. on Franklin St. and 60 ft. on the present line of the Danville & Western Railway Co., was of a market value of $2000.00; that the land lying to the East of the proposed line would be damaged more than $200.00 by reason of its isolation and would in no wise be benefited by the proposed line and that each of the lots to the West of the proposed line with the frontage of 50 ft. on Franklin St. would be damaged more than $200.00 by reason of the diminished depth, and that if a driveway was constructed or pro-
187 vided for to the West of the proposed track with right of access to the public of said drive-way, that the said lot would be materially benefited by reason of the construction of the proposed track.

And the court certifies that this was all of the evidence offered by the defendant on said issue. Thereupon the petitioner offered the testimony of the following witnesses:

WHITE BLAIR, a witness of lawful age, being duly sworn testified that he was a member of the City Council, was acquainted with the value of real estate in the town of Martinsville, that he believed the sum of $650.00 was a just and adequate compensation for the land sought to be taken, that the land lying to the East of the proposed track would not be materially damaged by reason of its isolation, that if access thereto were provided across the proposed track, the same could be used as a coal yard, and thus would be materially benefitted by the proposed track, that he was not acquainted with the grade of the proposed line, and whether it was feasible to approach the said track from East side, that the lots to the West of the proposed track would not be damaged thereby, but would be benefited to the value of between $2000.00 and $2500.00, that a lot on Franklin St. 60 ft. frontage, running back 125 feet to an accessible Railway track upon which cars could be stood for loading would be worth $2500.00 or $3000.00, and that if the depth of same were diminished to 90 ft. by the proposed condemnation, and it were impracticable to
188 stand cars upon the proposed track at the rear, that the value of said lots would be diminished 50%, but that if it were practicable to stand cars on said track, the value would not be diminished.

C. P. KEARFOTT, a witness of lawful age, being first duly sworn, testified that he was and had been for 20 years a resident of the town of Martinsville, that he had some knowledge of the value of real estate as a business man and real estate owner would generally have, that the portion of the land of the defendant, lying to the East of the proposed track would not be enhanced in value but would be diminished by reason of its isolation in a sum that he would estimate at something near $100.00, that he believed $650.00 would be a just compensation for the taking of the land sought to be condemned, that he believed the property to the West of the proposed line would be materially benefited, and if a right of access to the proposed track,

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1

upon which it were practicable to stand cars could be had, that the benefit would be very material, but that if no right of access to said track could be had, that the diminution in the depth of said lot would be 20% of the value thereof. That in his judgment that the residue of the tract outside of the land to be taken for the company's proposed works would upon the whole be enhanced in value 50% by the construction of said works.

189 J. L. ENGLISH, a witness of lawful age, being duly sworn, testified that he had a business man's acquaintance with the value of real estate in the town of Martinsville, that he was acquainted with the land in question, that he was the stamp deputy to the United States Commissioner of Revenue, that the property to the East of the proposed line would be valuable if it were accessible, but that if access thereto would not be provided for, or were not practicable, that the same would be practicably worthless, that he could not estimate the value of said land, east of said tract, that he believed $650.00 to be a just compensation for the taking of the land sought to be condemned, that the property to the West of the proposed line would not be damaged but would be materially benefited by the same, if access to a track upon which it would be practicable to stand cars could be had by the owner thereof.

And the court certified that this was all the evidence offered by the petitioner and that the defendant offered no further evidence, and that the court thereupon over ruled the objection and exceptions to said report to which rulings the defendant then and there excepted and tender- this her bill of exception # 6, and prays that the same may be signed, sealed saved to her and made a part of the record in this cause, which is accordingly done, this the 10th day of April, 1905.

E. W. SAUNDERS, *Judge*. [SEAL.]

190 The agreement of counsel is in words and figures following:

THE DANVILLE & WESTERN RAILWAY COMPANY
vs.
ANN M. HAIRSTON.

It is agreed between the parties hereto that any portion of the record in the case of Ann M. Hairston *vs.* the Danville & Western Railway Company, now pending in the Supreme Court of Appeals of Virginia, may be, so far as the same is relevant and proper, read and considered on the appeal in this case and as part of this record.

BERRYMAN GREEN,
GRAVELY & GRAVELY,
Attorneys for Petitioner.
JNO. W. CARTER,
HUNT & STAPLES,
Attorneys for Defendant.

MAPS

TOO

LARGE

FOR

FILMING

191 STATE OF VIRGINIA, *County of Henry, To-wit:*

I, J. H. Matthews, Cler- of the Circuit Court for the County aforesaid in the State of Virginia, do hereby certify that the foregoing is a true and complete transcript of the record and proceedings of the cause therein named, as the same appears on file and record in my office.

Except the printed record in the case of Ann M. Hairston *vs.* Danville & Western Ry. Co. and that Geo. L. Gravely attorney for the petitioner personally appeared in my office and waived the notice required to be given to the petitioner for the application of the record. Given under my hand this 28th. day of April, 1905.

J. H. MATTHEWS, *Clerk.*

Clerk's fees for Transcript of Record $46.37.

(Here follows map marked page 192.)

193 In the Supreme Court of Appeals of Virginia, at Richmond.

ANN M. HAIRSTON
v.
DANVILLE AND WESTERN RAILWAY COMPANY.

I, H. Stewart Jones, clerk of the supreme court of appeals of Virginia, at Richmond, do hereby certify that the foregoing petition and record in the above styled cause, with the refusal of the court endorsed thereon by the initials of three of its members and the names of the remaining two were transmitted to this office by the clerk of the supreme court of appeals at Wytheville on June 6th. 1905, where the Court was then in session. And I do further certify that the foregoing manuscript pages, being 30 pages of the petition and 161 pages of the record, with copy of map, is a true and perfect copy of the record of the suit aforesaid remaining in the clerk's office of the said court at the city of Richmond, Virginia, upon which record the writ of error applied for by Ann M. Hairston was denied.

In witness and attestation whereof I hereunto set my hand and affix the seal of said court at Richmond, Virginia, on this the 15th. day of June, 1905.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

H. STEWART JONES,
Clerk Supreme Court of Appeals of Virginia, at Richmond.

STATE OF VIRGINIA, *City of Richmond, To wit:*

I, James Keith, one of the judges and president of the supreme court of appeals of Virginia, do hereby certify that the attestation of the above record of Ann M. Hairston *v.* Danville and Western Railway Company, remaining in the clerk's office of the said court at Richmond, Virginia, made by H. Stewart Jones, the clerk of said court at Richmond, aforesaid, is in due form.

Given under my hand and seal this the 15th. day of June 1905.

JAMES KEITH, [SEAL.]
President Supreme Court of Appeals of Virginia.

194 UNITED STATES OF AMERICA, *State of Virginia:*

To the Honorable James Keith, President of the Supreme Court of Appeals of Virginia:

The petition of Ann M. Hairston respectfully shows that on the 6th day of June, A. D. 1905, the Supreme Court of Appeals of the State of Virginia, rendered a final judgment against your Petitioner in a certain cause, wherein the Danville & Western Railway Company, a corporation, chartered under the laws of Virginia, was Plaintiff, and your Petitioner was Defendant; by which judgment the said Court refused to your Petitioner a Writ of Error to a certain

judgment entered in the Circuit Court of Henry County, Virginia, on the — day of April, 1905, in the said cause, whereby it was adjudged that the said Plaintiff, the Danville & Western Railway Company, was entitled and empowered to take by condemnation proceedings, certain property belonging to your Petitioner in the said cause mentioned and described, as will appear by reference to the record and proceedings in said cause; and that said Supreme Court of Appeals of Virginia is the highest Court of said State in which a decision in said suit could be had.

And your Petitioner claims the right to remove said judgment to the Supreme Court of the United States by Writ of Error under Section 709 of the Revised Statutes of the United States, because by reason of the said judgment the said Plaintiff in said cause was authorized and permitted to take the private property of your Petitioner for a private use, whereby your Petitioner was denied due process of law in said proceedings, as appears by the record of the proceedings in said cause, which is herewith submitted.

Wherefore, your Petitioner prays the allowance of such a Writ of Error returnable into the Supreme Court of the United — and for Citation and Supersedeas: and your Petitioner will ever pray, etc.

ANN M. HAIRSTON, *Petitioner.*
WALLER R. STAPLES,
Attorney for Petitioner.

195 The Supreme Court of Appeals of the State of Virginia.

ANN M. HAIRSTON, Plaintiff in Error,
vs.
DANVILLE & WESTERN RAILWAY COMPANY, a Corporation, Defendant in Error.

Now comes the said Plaintiff in Error, and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of Appeals of the State of Virginia, in the above entitled matter, there is manifest error, in this, to-wit:—

The Supreme Court of Appeals of Virginia erred in refusing to the Plaintiff in Error, a Writ of Error to the judgment of the Circuit Court of Henry County, Virginia, complained of in the petition presented to said Supreme Court of Appeals, and embodied in this record, and in not granting to your Petitioner a Writ of Error to said judgment, and in not reviewing and reversing the said judgment, and in not adjudging that the object and purposes of the proceedings by the Defendant in Error to condemn the land of the Plaintiff in error was a private and not a public use, which said judgment of the Circuit Court of Henry County, Virginia, so complained of, was in manifest error, in that thereby it was adjudged and determined that the Defendant in Error was entitled and empowered to take by condemnation proceedings property belonging to the Plaintiff in Error, and in said cause mentioned and described, which said property was sought to be condemned by the Defendant in Error with the purpose of subjecting the same not to a public but

to a private use, and which said judgment of the Circuit Court of Henry County, Virginia, was in further manifest error in that therein it was not held that the object and purposes of said proceedings was to condemn the lands of the Plaintiff in error
196 for a private and not a public use, which question involving the denial to the Plaintiff in Error of due process of law was raised at the inception of this cause as appears from the record.

For which error the Defendant Ann M. Hairston, prays that the judgment complained of be reviewed and reversed and judgment entered for her in said cause.

WALLER R. STAPLES,
Attorney for Ann M. Hairston.

197 Supreme Court of Appeals of Virginia.

ANN M. HAIRSTON, Plaintiff in Error,
v.
DANVILLE AND WESTERN RAILWAY COMPANY, a Corporation, Defendant in Error.

Petition for Writ of Error.

Considering herself aggrieved by the final decision of the Supreme Court of Appeals in rendering judgment against her in the above entitled cause, the plaintiff hereby prays a writ of error from the said decision and judgment to the Supreme Court of the United States. Assignment of errors herewith.

WALLER R. STAPLES,
Attorney for Plaintiff.

Supreme Court of Appeals.

198 STATE OF VIRGINIA:

Let the Writ of Error issue upon the execution of a bond by the Petitioner Ann M. Hairston payable to the Danville and Western Railway Company in the sum of $1,000.00 said bond when approved to act as a supersedeas.

Dated June 15th. 1905.

JAMES KEITH,
President Supreme Court of Appeals of Virginia.

199 Supreme Court of the United States.

ANN M. HAIRSTON, Plaintiff in Error,
vs.
THE DANVILLE & WESTERN RAILWAY COMPANY, a Corporation, Defendant in Error.

Bond.

Know all Men by These Presents, That we, Ann M. Hairston, as principal, and E. P. Hairston and W. H. Hairston, as securities, are held and firmly bound unto the Danville and Western Railway Company in the sum of One Thousand Dollars ($1,000.00) to be paid to the said Danville and Western Railway Company, to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals and dated this 16th day of June 1905.

Whereas the above named plaintiff in error seeks to prosecute her writ of error to the Supreme Court of the United States to reverse judgment rendered in the above entitled action by the Supreme Court of Appeals of Virginia.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute her said writ of error to effect, and shall answer all costs and damages that may be adjudged if she shall fail to make good her plea, then this obligation to be void, otherwise to remain in full force and effect.

ANN M. HAIRSTON. [SEAL.]
E. P. HAIRSTON. [SEAL.]
W. H. HAIRSTON. [SEAL.]

STATE OF VIRGINIA, *County of Henry, ss:*

Ann M. Hairston, E. P. Hairston and W. H. Hairston, being each duly sworn, on oath depose and say: We are each of lawful age and are citizens of the state of Virginia, and know the contents of the foregoing instrument to which we have attached our names. We each for himself and herself say we are worth the sum of One Thousand Dollars ($1,000.00) over and above all debts, liabilities and exemptions.

ANN M. HAIRSTON.
E. P. HAIRSTON.
W. H. HAIRSTON.

Subscribed and sworn to before me this 16th day of June 1905.

JNO. W. CARTER,
Commissioner in Chancery for the Circuit Court of Henry County, Va.

The above bond is approved,

JAMES KEITH,
President of the Supreme Court of Appeals of Virginia.

The original of the foregoing supersedeas bond was lodged with the clerk of the supreme court of appeals of Virginia, at Richmond, on June 22nd 1905, and the following endorsement made thereon: Bond. Filed June 22, 1905.

H. STEWART JONES,
Clerk Supreme Court of Appeals of Virginia, at Richmond.

[Endorsed:] Bond. Filed June 22, 1905.

200 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Supreme Court of Appeals of Virginia:

Because, in the records and proceedings, as also the rendition of a judgment in the said Supreme Court of Ap- of Virginia before you at the June term 1905 thereof between the Danville and Western Railway Company plaintiff *versus* Ann M. Hairston defendant a manifest error has happened to the great damage of the said defendant as by her complaint appears.

We being willing that error, if any has been should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the United States Supreme Court together with this writ so that you have the said record and proceedings aforesaid at the city of Washington D. C., and filed in the office of the Clerk of the United States Supreme Court on or before thirty days from the date hereof to the end that the record and proceedings aforesaid being inspected the United States Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness The Honorable Melville W. Fuller, Chief Justice of the Supreme Court of The United States this 22d day of June 1905.

[Seal United States Circuit Court, Eastern District of Virginia.]

JOSEPH P. BRADY,
Clerk United States Circuit Court for the Eastern District of Virginia.

Allowed.
JAMES KEITH,
President of the Supreme Court of Appeals of Virginia.

[Endorsed:] Hairston *v.* Danville & Western Railway Company, a corporation. Writ of error. Filed June 22, 1905.

201 The original of the foregoing writ of error was lodged with the clerk of the supreme court of appeals of Virginia on the 22nd. day of June 1905, and also at the same time and place a copy thereof for the defendant Danville and Western Railway Company. The following endorsement was made upon the said original writ and upon the copy: Writ of error. Filed June 22nd. 1905.

H. STEWART JONES,
Clerk Supreme Court of Appeals of Virginia, at Richmond.

202 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Danville and Western Railway Company, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C. within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of The State of Virginia wherein Ann M. Hairston is the Plaintiff in Error and you are the defendant in Error, to show cause, if any there be why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness The President of The Supreme Court of Appeals of Virginia this 15th. day of June 1905.

[SEAL.] JAMES KEITH,
President of the Supreme Court of Appeals of Virginia.

Attest:
H. STEWART JONES,
Clerk of the Supreme Court of Appeals of Virginia.

203 [Endorsed:] Executed June 29 1905 by delivering a true copy of the within citation and a copy of the supersedeas with the endorsement of the bond had been executed, to Pannill Rucker, a director of the Danville & Western Railway Company within my bailiwick, the said Pannill Rucker residing within my county and neither the president, cashier, treasurer, or general superintendent of said Company being residents of my county. J. M. Davis, Sheriff of Henry County, by H. A. Ford, D. S. Fee $1.00.

204 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Appeals of Virginia, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of Appeals, in the City of Richmond, this 5th day of July, 1905.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

H. STEWART JONES,
Clerk Supreme Court of Appeals of Virginia.

Endorsed on cover: File No. 19,840. Virginia sup. court of appeals. Term No. 77. Ann M. Hairston, plaintiff in error, *vs.* The Danville and Western Railway Company. Filed July 11, 1905. File No. 19,840.

Office Supreme Court, U. S.
FILED
OCT 4 1907
JAMES H. McKENNEY,
CLERK

No. 6.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

[redacted]

ANN M. HAIRSTON, PLAINTIFF IN ERROR,

vs.

THE DANVILLE AND WESTERN RAILWAY COMPANY.

BRIEF FOR APPELLEE.

GEORGE E. HAMILTON,
M. J. COLBERT,
For Defendant in Error.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 23677

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 77.

ANN M. HAIRSTON, PLAINTIFF IN ERROR,

vs.

THE DANVILLE AND WESTERN RAILWAY COMPANY.

BRIEF FOR APPELLEE.

Statement.

In December, 1904, the defendant in error filed a petition in the circuit court of Henry county, Virginia, seeking to condemn the lands of the plaintiff in error herein described for the purpose of obtaining additional land for "constructing and providing better facilities and the extension of a spur track from its said main line to the property of Rucker and Witten Tobacco Company and to Fountain street, in the town of Martinsville." This petition was regularly filed, according to the Virginia statute, in the circuit court for the county of Henry, in said State of Virginia. The petition will be found in the record, page 18. The plaintiff in error first demurred and afterwards answered said petition, and, on hearing, the application of the plaintiff was granted and a

commission appointed and duly instructed as to its duties, as will appear on record page 38. Testimony was taken, and the award of the commission was approved by a judgment of the circuit court. Application for a writ of error was made to the supreme court of appeals, and after consideration by said court the writ was denied. Thereupon the case was brought to this court on a writ of error to the supreme court of appeals of Virginia on the ground, and the sole ground, that the land sought to be condemned by the defendant in error was for a private and not a public use, and therefore constituted a taking of the property of the plaintiff in error without due process of law.

ARGUMENT.

If the record in this cause discloses a Federal question, then the only point to be considered is whether the purpose for which the land in question was sought to be condemned constitutes a public use. And what is a public use for which private property may be taken by due process of law depends upon the particular facts and circumstances connected with the particular subject-matter.

Fall Brook Irrigation District *vs.* Bradley, 164 U. S., 112.

The uses for which this property is sought are described in the application of the defendant in error, heretofore referred to, and more fully described and developed in the testimony taken in support of said petition; and on this point the court is referred to the testimony of Major Theodore Parker (Rec., p. 42 *et seq.*), and the testimony of Major Parker is supported by several witnesses whose testimony follows in the record.

No testimony is contained in the record on behalf of the plaintiff in error. On page 40 of the record is to be found an order of court based upon an agreement of counsel that

the record in a former case, which is referred to in the plaintiff's brief as having been filed September 14, 1903, and the testimony therein contained should be made a part of this record, but that record was not printed into this record, and therefore cannot be considered.

In the petition of the defendant in error for the condemnation of the land referred to it is stated that "by reason of the growth of said town of Martinsville, and the large increase of the business in said town, said railway company, in order to meet the demands upon it for the transportation and carrying of freight and the accommodation of the public in transacting its business, is compelled to secure and obtain more land than it at present owns for the constructing and providing additional facilities, and extension of a spur track from its main line to the property of the Rucker & Witten Tobacco Company hereinafter mentioned and Fountain street, in the said town of Martinsville; and to this end it is needful for said Danville & Western Railway Company to secure," &c. Major Parker, in explaining why the route projected was decided upon, says (Rec., p. 43):

> "In order to get out of Franklin street, I selected a lower route, and employed a competent engineer to lay off and make plans for the most feasible track, to obtain as much team track room as possible, and at the same time, to reach the plant of the Rucker & Witten Tobacco Co. I was informed that this plant would be very greatly enlarged, and in fact, the entire business of this concern would eventually be consolidated at Martinsville. By adopting the route proposed, we would not only reach the plant of the Rucker & Witten Tobacco Co. and thereby secure for the Danville & Western a great increase in business, but we could also greatly enlarge our team track facilities. I mean by that, the portion of the track on which loaded cars would be placed to be unloaded by merchants and others in Martinsville doing business here. * * * In addition to that we would reach the Rucker & Witten Tobacco Company's plant, and

> we would thus be enabled to place cars for that concern immediately at the factory doors, thus relieving the short team track we have in the yard, and also doing away entirely with the danger of using this Tabernacle track as a team track (the Tabernacle track being a short side track or spur in close proximity to the depot). We can also place empty cars at the Rucker & Witten Co.'s plant, in which they can load their tobacco shipments. This will also greatly relieve us at the station."

The testimony of other witnesses as to the uses to which this track would be put is contained in the record.

The circuit court of Henry county was of the opinion that this use was a public one, and thereby ordered condemnation, and the view of the circuit court of Henry county was adopted by the supreme court of appeals of the State of Virginia.

What constitutes such a public use as will be the proper ground for the exercise of the right of condemnation has been frequently considered by the courts of the several States, and, while some conflict may be found, it can, we think, be safely stated that the great weight of authority is to the effect that land may be taken for the purpose of constructing a siding or a spur even to a single industry.

The question of public use is determined by the right of the public to use it and not by the actual use, and that so long as the public has the right to use the track the fact that it is intended primarily for the benefit of a private enterprise is immaterial.

In Ulmer *vs.* Lime Rock Company, 98 Maine, 579, this question is very fully discussed, and it is there stated that "the mere fact that the primary purpose of such a branch is to accommodate a particular private business enterprise is by no means a controlling test. The character of the use, whether public or private, is determined by the extent of the right by the public to its use, and not by the extent to which that right is or may be exercised. If it is a public way in fact, it is not material that but few persons will enjoy it."

And further on in the same opinion it is said: "If the track is to be open to the public, to be used upon equal terms by all who may at any time have occasion to use it, so that all persons who have occasion to do so can demand that they be served without discrimination, not merely by permission, but as of right, and if the track is subject to governmental control, under general laws, as are the main lines of a raiload, then the use is a public one, and the legislature may grant the power to exercise the right of eminent domain to a corporation which is to construct and operate such track; and, if the purpose of the railroad corporation in building any particular branch track is to operate the same in conformity with these requirements, then the power granted by the legislature may be exercised in that particular case. This is in accordance with the almost unbroken line of decisions of the appellate courts of the various States of this country;" and then follows a review of the many cases collected in that opinion.

A similar doctrine is laid down in the case of Chicago and Northwestern Company *vs.* Morehouse, 112 Wis., 1. In that case the court says: "A brief reference to some of the leading authorities will amply show that the fact that a spur track may run to a single industry does not militate against the devotion of the property thereto being a public use thereof, so long as the purpose of maintaining the track is to serve all persons who may desire it and all can demand, as a right to be served, without discrimination."

See also—

Hayes *vs.* Risher, 32 Pa., 169.
Harvey *vs.* Thomas, 10 Watts, 63.
Denver R. R. Co. *vs.* Union Pacific Co., 34 Fed., 386.

In Chicago Dock Company *vs.* Garrity, 115 Ill., 155, the court says: "All termini of tracks and switches are more or less beneficial to private parties, but the public character of the use of the tracks is never affected by this. If they are open to the public use indiscriminately, and under the public

control to the extent that railroad tracks generally are, they are tracks for public use. It may be in such cases, that it is expected or even that it is intended, that such tracks will be used almost entirely by the manufacturing establishment, yet if there is no exclusion of an equal right of use by others and this singleness of use is simply the result of location and convenience of access, it cannot affect the question."

In C., B. & N. Co. *vs.* Porter, 46 N. W. R., 75, which is a case from Wisconsin, the court says: "The switch track * * * is to be part of a system of track, all belonging to the general enterprise of maintaining and operating a railroad for public use. The character of the use, in the case of a railroad or railroad track, does not depend on the amount of business or the number of persons who may have occasion to use it, but on the right of the public to the benefit of it. If all the people have a right to the use of it, it is a public use or interest, though the number who require its use may be small."

In the cases cited are contained numerous other cases collected from the reports of the various States, all of them laying down the same rule. The rule above contended for is the rule laid down by the courts of Virginia, and in Zirkle *vs.* Southern Railway Co., 102 Va., 17, the question is very fully discussed. The cases are reviewed and the rule above insisted on positively stated. In the course of his opinion Judge Whittle says: "The authorities practically speak with one voice, to the effect that if the use to be subserved is a public use, the fact that the branch road inures to the advantage of a particular individual or class of individuals will not render the use any the less public."

The two cases so much relied on by the defendant in error are the Pittsburg, &c., R. R. Co. *vs.* Benwood Iron Works, 31 W. Va., 710, and Kyle *vs.* Ry. Co., a case from Texas, reported in the 4th L. R. A., 275. These cases are opposed to the uniform current of authority, and are reviewed in the case of Ulmer *vs.* Lime Rock Co., *ante*, and the rule sought to be established by them and the reasoning upon which that

rule is based are criticised, if not discredited, and in the case of Chicago & Northwestern R. R. Co. *vs.* Morehouse, heretofore referred to, the court says: "That case really seems out of harmony with the current of authority, unless it is viewed in the light of the conclusion reached by the court, that the attempt to take private property, though ostensibly for public use, was really for the exclusive use of the proprietor of a particular industry; that is to say, that it was not the purpose of the railway company, in taking the property, to give all persons desiring to be served by it equal privileges. The court may be said to have determined the question of good faith against the petitioner, and on that based its decision."

An examination of the several cases relied on by the plaintiff in error in its brief discloses the fact that very few of them, when examined, support the contention of the plaintiff in error in any degree whatever. Particularly may this be said of the case of the Board of Health *vs.* Van Hoesen, in 14 L. R. A., 114, brief of the plaintiff in error, page 7, which refers only to the condemnation of land for a private cemetery. If, therefore, the only purpose claimed by the defendant in error was the purpose of extending a track to the Rucker and Witten Tobacco Company's warehouses, the condemnation under the authorities given would be permissible and legal, but when it is alleged in the petition and supported by uncontradicted proof that that is only one of the purposes intended, and that the company's desire is to obtain additional facilities for its general business and for the handling of team-track cars and the relief of overcrowded existing switches or side tracks, there can, it seems to us, be no question about the fact that the use intended is a public use.

It is respectfully submitted that there is no error in the judgment of the circuit court of Henry county and the supreme court of appeals of the State of Virginia, and that the judgment below should be affirmed.

GEORGE E. HAMILTON,
M. J. COLBERT,
For Defendant in Error.

No. 6.

IN THE

Supreme Court of the United States

ANN M. HAIRSTON, Plaintiff in Error

vs.

THE DANVILLE AND WESTERN RAILWAY COMPANY

In Error to the Supreme Court of Appeals of the State of Virginia.

CLOSING BRIEF FOR PLAINTIFF IN ERROR.

IN THE

Supreme Court of the United States.

ANN M. HAIRSTON, PLAINTIFF IN ERROR

vs.

THE DANVILLE AND WESTERN RAILWAY COMPANY

In Error to the Supreme Court of Appeals of the State of Virginia.

CLOSING BRIEF FOR PLAINTIFF IN ERROR.

The brief of counsel for Defendant in error rests the right to exercise the power of eminent domain on the ground that the use to which the land of the Plaintiff in error is to be devoted is a mixed use partly private and partly public. The public use alleged to exist is the increased facility for loading and unloading freight cars in Martinsville, Virginia. The Plaintiff in error resists such exercise on the ground that the use is entirely private or if mixed, that "the private benefit too clearly dominates the public interest to find constitutional authority for the exercise of the power of eminent domain, and is the equivalent of taking private property for private use against the will of the owner." Fallsburg Mfg. Co. *vs.* Alexander 101 Va. 98, 43 S. E. 194.

THE PRIVATE USE.

The private use is clearly and unmistakeably defined.

1st. The resolution of the Board of Directors:

That the exercise of the power of eminent domain delegated to the Corporation by the State is confided to the Directors, can scarcely need authority. They represent the Corporation in all corporate acts involving a discretion, and their discretion can not be delegated. Clark on Corporations, §192.

Hence it is to the action of the Board of Directors of the Defendant Company that the Court will look to ascertain the avowed purposes of the condemnation proceeding. The resolution of the Board of Directors declares the condemnation proceeding to be for the purpose of extending the track from or near the depot at Martinsville, Virginia, to the property of the Rucker-Witten Tobacco Company in same town" and the Chairman "laid before the Directors a plot showing the lands necessary to be secured for the purpose." Record p. 30.

The plot or map so referred to is found on page 92. The resolution is silent as to the purposes of the Board, but the map sufficiently discloses that the object of the proceedings is essentially private.

It appears from the map that the proposed spur or switch starts at the main line of railway, runs a few feet through a corner of the property of the Alliance Warehouse Company, about 800 feet through the lands of the Plaintiff, and the residue of the distance through the lands of the Tobacco Company alongside its factory.

As the map discloses no public access to the switch at any point, but shows a line through private property from a private factory to the main line, such map taken in connec-

tion with the resolution of the Board, would sufficiently establish a private utility as the purpose of the construction.

2d. The contract between Defendant and the Tobacco Company:

The contract between the Defendant and the Rucker-Witten Tobacco Company, in pursuance of which the condemnation proceedings were instituted, provides that the Tobacco Company is to *donate* a right of way of 40 feet in width for the spur through that portion of the Tobacco Company's land lying south of Fontaine Street, and to allow the Railway Company the use of that portion of the land lying north of Fontaine Street for the purposes of the Tobacco Company, and no other. The Tobacco Company was also to pay the cost of a right of way through the Plaintiff's land, whether acquired by purchase or condemnation, and to pay the cost of constructing the road-bed, but the cost of construction, including the cost of the right of way, was to be refunded without interest, on the completion of the work. The Defendant contracted to "keep open and maintain said side or spur track and exension, so long as the said party of the second part, their successors and assigns, shall continue to operate their said tobacco manufacturing establishment;" and at the same time reserved the right, at its option, in case the operation of said factory was abandoned for six months, upon notice to said Tobacco Company, "to cease to use and operate said spur side track or extension, or *any part* thereof, and *remove its rails* and all fixtures thereform," all the right of the Defendant in the lands donated the Tobacco Company to revert to the latter. (Record P. 32 cl. 3,3 d. 3. cl. 6.)

It would seem too clear for argument that a track to connect the tobacco factory with the railway at the joint cost of both companies to continue while the factory is in

operation, and to be abandoned when the factory has ceased operations for six months, constitutes a private use of the most transparent character.

THE PUBLIC USE.

It is claimed, however, that the track will afford enlarged facilities for loading and unloading cars in Martinsville, that this use is public, and none the less public because of the private use, to be subserved under the contract aforesaid.

Facilities for loading and unloading cars by the general public are a public use, and none the less so because a private use is subserved, but the Plaintiff denies that the proposed track was conceived with any purpose on the part of the Defendant to utilize it for loading and unloading, that any provision has been made therefor by the Defendant, or that the spur when constructed will be available for such purpose.

While it is true that a use is none the *less* public because it subserves a private interest, it it also true that it is not thereby any the *more* public. The true doctrine is that the right to take property *in invitum* is not affected in any way by the private use or advantage except in so far as the party benefited thereby constitutes one of the public. In determining whether or not a use is public, the private advantage should be eliminated from consideration, and the public advantage alone considered.

In Warner *vs.* Martin, 21 W. Va. 535, a case which so far as we are aware, has never been criticised, and which is cited with approval in Fallsburg Power Co. *vs.* Alexander 101 Va. 98, it is held that to constitute a public use, the use which the public is to have of such property must be fixed and definite, and substantially beneficial and which it could

not do without except by suffering great loss or inconvenience. (See Syllabus P. 556–557). This is tantamount to saying that to justify the taking of property *in invitum* the public must have a need therefor coupled with the *right* and *opportunity* to enjoy the same, and such need, *right* and *opportunity* must be obviously fixed and definite. The burden is on the applicant to show this.

In other words, the Defendant must show in this case that there is a need for additional facilities for loading and unloading freight on and from its cars in Martinsville, and that the spur in question will afford the public a definite opportunity to use such spur therefor as a matter of right. It is respectfully submitted that neither the resolution nor the map aforesaid, nor the evidence introduced will show that the defendant contemplated such use or made such provision therefor.

IS A PUBLIC USE CONTEMPLATED OR PROVIDED FOR BY THE DEFENDANT?

The contract between the Defendant and the Tobacco Company contains an elaborate recital of the need at Martinsville of additional terminal facilities, and their need is reiterated in the abstract from the testimony of the Defendant's Superintendant incorporated in the brief of counsel for Defendant. It is not to the recital of this contract or the statement of the Superintendant that the Court will look for the purposes or plans of the Corporation. In such matters, as has been said, the Board of Directors alone can act for the Corporation; they alone can exercise the power of eminent domain, and nothing the President can recite in a contract or the Superintendant can state in evidence can convert into

a public use one contemplated by the Board as essentially private.

But had they the power, the Court would not be controlled thereby. In the matter of the Niagara Falls & Whirlpool Railroad Company, 108 N. Y. 384, the Court said: "The papers on their face show that the Corporation has undertaken an ordinary railroad enterprise within the purview of the Act of 1850, in aid of which the power of eminent domain may be appropriately exercised. But when we look beyond the formal documents and the actual business proposed to be conducted, is considered, we find that the proposed railroad has no proper termini; that it is not a highway in any just and proper sense, that it can not by reason of necessary limitations, perform one part of the duty it has undertaken, viz.: the transportation of freight, etc."

It is very earnestly submitted that if we look beyond the formal recitals and general statements contained in this case, to the real conditions as shown by the substantive provisions of the contract above referred to, and by the map made a part of the resolution of the Board of Directors, it will be seen that not only does the Corporation not contemplate the use of the siding for public loading and unloading of freight, but that under the necessary limitations imposed by the conditions under which it is to be operated such loading and unloading is impracticable. Referring to the map the Defendant's Engineer on page 61 of the record, says:

Q. "Isn't it a fact, Mr. Hall, that the line between the points 9, 10, 11, 12, 13, and the beginning point practically represents the position of the slope stakes for the cutting and grading of that proposed track? By the slope stakes, I mean the stakes which should be set at the foot of the fill or the top edge of the cut?"

A. "Well, this line which you have indicated here doesn't show any right of way at all, or any work on it."

Q. "I mean from here, from right here back. 9, 10, 11, 12, 13?"

A. "Oh, yes, that line. No it does not. I don't think it does. Yes about that, as well as I can judge off hand, figuring the slope."

Q. "And the fall of the land?"

A. "Yes, sir, the fall of the land and so on."

Q. "What width embankment does that provide for?"

A. "Fourteen feet on top."

Q. "So that if your track is constructed by the center line as shown on the map with a road-bed of 14 feet, the land which you have staked out on the east side of the track will be practically taken for the slopes or cut and fill?"

A. "Yes, sir."

And this condition is shown to exist as to the west side of the center line. See pages 61–2–3.

The substance of this testimony given by the Engineer who laid off the right of way and prepared the map adopted by the Board, is in brief as follows:

A 14-foot road-bed is to be constucted from the Defendant's main line to the factory, as indicated by the center line, a part of which will be in cuts, and a part in fills. In laying off the side lines only so much land was to be taken as was necessary for the *slope* of the cut and fills and that the side lines shown on the map indicate the tops of the cuts and the bottom of the fills, hence the varying width of the right of way. In other words, the road-way is 14 feet the residue of the right of way being for the slopes of the cuts and fills. The line enters the Plaintiff's land near Station 3 in a three foot cut, and leaves it near Station 9 on an eighteen foot hill,

and the grades and cuts following indicates the topography of the land to be taken:

At Station 3+50 the track is at grade.
At Station 3+75 the track is on a 15 foot fill.
At Station 5 the track is on a 6 foot fill.
At Station 5+50 the track is on a 5 foot fill.
At Station 6 the track is near grade.
At Station 8+50 the track is on a 13 foot fill.

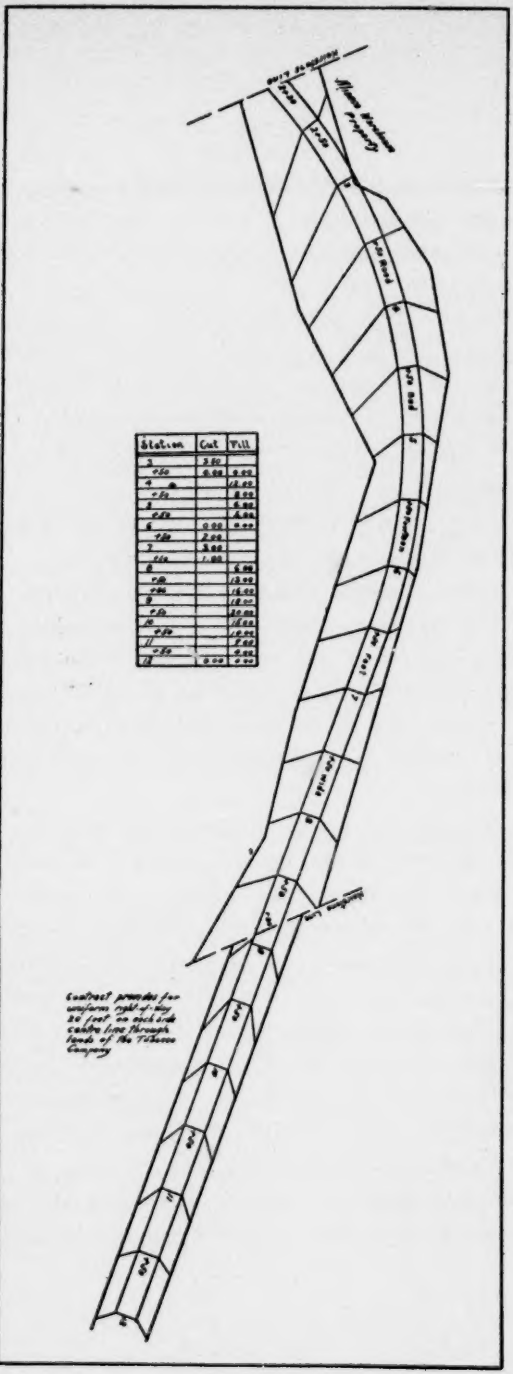
This will appear more clearly from the diagram found on the opposite page. That diagram is of course illustrative not evidential and its illustrative value depends entirely upon its mathematical accuracy; such accuracy may be easily verified by a comparison with the map which is in evidence as explained by the Engineer who prepared it.

On page 51 of the record, the defendant's Superintendent was asked:

Q. "How much land will it require on that side of the track on which you stand the teams for it to be used for that purpose? (Loading and unloading).

A. "About 40 to 45 feet including the track, and outside of the track, 30 feet."

The cross ties of a railroad are between 8 and 9 feet in length, the freight cars about 8 feet in width, leaving 3 feet of road-bed on each side of the car. The utter impracticability of loading and unloading cars from and on wagons when the cars are standing on a fill the top of which is 14 feet wide is too manifest to need the testimony of the Superintendent. The Engineer, however, suggested the *possibility* of a retaining wall. Whatever may be the possibilities in that direction, there is nothing to show that any provision has been made therefor, or that it was ever contemplated by the Board of Directors. On the contrary, the map adopted


Station 0+00
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by the Board *shows they did not contemplate a retaining wall.* In sloping cuts, the depth of the cut determines the width of the top, in sloping fills, the height of the fill, determines the width at the bottom, while if a retaining wall is built, the depth of the cut or height of the fill, although it affects the height of the wall, in no sense affects the width between the walls. In planning for a retaining wall, the right of way would be a uniform width, while in planning for cuts and fills with slopes the right of way varies with the topography of the land.

The map adopted by the Board is of varying width, taking just what is necessary for sloping cuts and fills.

Again: A careful study of the map adopted by the Board, will disclose no means of access for vehicles to the right of way or spur. Its connection with the main line is at a point inaccessible to vehicles, and the entire length of the spur including its northern terminus, abuts on private property, that portion on the Plaintiffs' land being in rear of her residence lots.

It is suggested in the evidence that there is a street crossing the right of way at right angles between Plaintiff's northern line and the tobacco factory. The Engineer who located the right of way and made the map was unable to ascertain the whereabouts of the street with sufficient accuracy to justify him in placing it on the map. (Record P. 64). The most favorable construction of the evidence could only justify the contention that there is somewhere between the Plaintiff's northern line and the factory, a potential, ungraded and unlocated street. This is surely too indefinite to constitute the entire basis of a public use.

Let it be admitted, however, that there is a potential street between those points, it will still fall far short of afford-

ing a means of using the spur for loading and unloading. The street itself could not be used for that purpose as it would involve standing the cars across a public highway.

It will be remembered that the spur crosses Plaintiff's line between stations 8 and 9 on a fill 18 feet high at Station 9, and is at Station 10 within 70 feet of the factory still on a fill 15 feet high. Were the possible street located and raised to the grade of the fill, the teamster who wished to load or unload cars, would find himself at the open end of an elevated cul-de-sac 14 feet wide, from 15 to 18 feet high, and with less than 7 feet available for driving, loading and turning, a maneuver which the Defendant's Superintendent admitted required a space of 30 feet.

The distance from the Plaintiff's line to the factory approximates 170 feet, that portion of the right of way north of Fontaine Street being reserved exclusively for the use of the tobacco factory, and that on the south side being on a fill varying from 10 to 18 feet in height and 14 feet in width. The teamster can not turn to the north to load or unload, because that is reserved for the exclusive use of the tobacco factory and there is no public right of *user*. He can not turn to the south because the width of the top of the fill is insufficient. He can not load in the street because it is an obstruction of a highway. *He is afforded absolutely no opportunity to enjoy this so-called public use.* These conditions, taken in connection with the provision in the contract referred to for removing the entire track and fixtures when shipments to the factory permanently ceased, justify the conclusion that the Defendant considered alone the private use, and held in contemplation, and made provision for no public use, and that there can be no practical substantial public use of the track.

The contention of counsel for Defendant would seem to be that no *actual* use is necessary, but that the *right* to use is alone sufficient warrant for taking private property *in invitum* and several authorities are relied on for the contention. As will be shown, the authorities cited do not sustain the contention; but before considering them, it may be well to return to first principles and enquire,—On what vests the right of eminent domain?

In Pollard *vs.* Hagan, 3 How. 223, Mr. Justice McKinley said: "The right which belongs to, the society or to the sovereign of disposing in *case of necessity* and for the public safety of all the wealth contained in the State is called the eminent domain. It is evident that this right is in certain cases *necessary* to him who governs, and is consequenty a part of the empire or sovereign power. (Vat. Law of Nations, Section 42)." (Italics ours.)

It is to be regretted that the Courts of some of the states appear to have confused the promotion of the public welfare generally, with public necessity or the demands of public safety, and impressed with the glittering prospect of a magnificent commercial empire, have magnified the general advantage of industrial enterprise and minimized the sacredness of private rights. "It would not be safe" said Judge Cooley, "to apply with much liberality the language above quoted that when the public interest can be in any way promoted by the taking of private property, the taking can be considered for a public use."

The subordination of private rights to the public interest, as contradistinguished from a direct public use, is the chief characteristic of communism but is a dangerous element in constitutional government.

The influence of commercial advancement must from its

nature overshadow the influence of private rights and its potentiality grows in the ratio of its development, and here as elsewhere, the weak must look to their constitutional rights for protection against the strong. The theory that a public service corporation may, because it *is a public service corporation*, appropriate private property to any purpose that contributes to its general utility, regardless of whether any such public use of the land to be taken is contemplated or not, has already received too much indirect approval. It is made by the Constitution, a peculiar trust of this Court to confine the exercise by the State of the power of eminent domain to the demand of public necessity or safety, and to restrain its application to remote benefit or abstract rights unattended by any public need or utility. But far as some of the Courts have gone, it is believed that no well considered case can be found in which the taking of private property was justified on the ground that there was a public *right* to enjoy what there was no public opportunity to enjoy.

It is axiomatic that where there is a public need for a track and a public right and opportunity to use it, there will be an actual use, and that where there is no actual use, either the need, right or opportunity is wanting.

We are unable to discover in any of the cases cited in the brief of counsel for Defendants, any adjudication in conflict with this self evident proposition. It is true that *language* is found in some of the opinions quoted which, isolated from the context and facts to which they are applicable, may be apparently inconsistent therewith, but when it is seen that in none of the cases cited was the *opportunity wanting* or *even questioned*, and when the language used by the Court is considered in its true setting, it will be found in entire harmony with the controlling principal above declared.

In the case of Ulmer *vs.* The Lime Rock R. Co. 98 Me. 579, 57 Atl. 1002, the object of the proceedings instituted by the company was to condemn Ulmer's land for a "branch track from one of its main lines to a lime quarry owned by the Rockport Lime Co." The Court held that the Branch line when completed, would reach "all of the kilns, quarries and other property that can be accommodated by its southern, northern and other branches." And said:

"There is no arbitrary rule by which this question (a public use) can be determined in all cases. It must be decided by the application of general principles to the particular facts of each case. Of course the general question is whether said track is to be constructed for private purposes or for public use. If the branch is to be built solely and exclusively for the benefit and accommodation of the railroad company and of the owner of the private business it may well be said that it would serve no public purpose and would be of no public use, although the existence of such a track might be a great, but indirect benefit to the community by giving employment to labor."

The case does not justify the construction adopted by the learned counsel, and, tested by its true construction, fails to sustain the right of eminent domain.

In Chicago & Northwestern Ry. Co. *vs.* Morehouse 112 Wis., 1 56 L. R. A. 240, the statement of the case is by Marshall J. in which he said:

"The Court found among other things, that there were located and to be located, important industries intended to be reached by the proposed spur track." It was admitted that the Statute of Wisconsin authorized the proposed condemnation, but its constitutionality was denied. The Court said:

"Appellant's Counsel contend in effect that if the Statute by its terms, authorized the taking of private property for a right of way for a spur track to a particular industry for the sole use of the proprietors thereof and the Railroad Company, it is unconstitutional and that such was the end sought by respondents. On the case made by the finding of fact upon the decision appealed from, we do not need to discuss that proposition."

The Court then declared that such spur track was "to form an integral part of the railway system and to be operated so as to facilitate the transportation of ice for all persons desiring such service without discrimination." The case can scarcely be said to render valuable support to Defendant's contention.

In Chicago Dock Company *vs.* Garrity 115 Ill. 155, the proposed track was an extension of an existing track, and was to run along a public street its entire length, and no question of opportunity of a public user was or could be raised. The language quoted in brief of counsel for Defendant, sufficiently shows this. "*If they are open to the public use indiscriminately*, and under the public control to the extent that railroads generally are, they are tracks for public use." (Italics ours.) An examination of the case will show that the question of difficulty was rather the character of the Corporation invoking the power of eminent domain, than the nature of the use, the Court intimating that if the application were made by the Railroad Company instead of the Dock Company, the objections would not have been raised.

In Harvey *vs.* Thomas 10 Watts 63, and Hayes *vs.* Risher 32 Pa. 169, the question involved was the constitutionality of the Pennsylvania Lateral Railroad Acts. In the former case the constitutionality of the Statute involved, was sus-

tained on the ground there was nothing in the Pennsylvania Constitution to prohibit the *taking of private property for private use*, while in the latter case the Court construed the Statute to refer to a public use so manifestly that to deny the Constitutionality of the Statutes was tantamount to denying to the State of Pennsylvania the power of eminent domain, the Court saying:

"Until therefore somebody can prove the State to possess no right of eminent domain, can point out some provision of her Constitution which forbids her taking private property for public purposes, no progress will be made in demonstrating the unconstitutionality of the lateral Railroad Law."

The pertinency of the authorities is not appreciated, nor are we able to discover the application intended to be made of Dennis R. R. Co. *vs.* Union Pacific Co. 34, Fed. 386.

It is respectfully submitted that there is error in the judgment of the Circuit Court of Henry County, Virginia, and of the Supreme Court of Appeals of Virginia, for which the same should be reversed.

HUNT & STAPLES,
ABRAM P. STAPLES,
For Plaintiff in Error.

In the Supreme Court of the United States.

ANN M. HAIRSTON, *Plaintiff in Error,*

vs.

THE DANVILLE AND WESTERN RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

OPENING BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

On September 14, 1903, the Defendant in Error filed its petition in the Circuit Court of Henry County, Virginia, the object of which was to condemn certain lands of the Plaintiff in Error for a right of way for a track from the depot of the Defendant in Error, in the town of Martinsville, Virginia, to the factory of the Rucker Witten Tobacco Company in said town. Judgment in said proceedings was given in favor of the Defendant in Error and a writ of error to said judgment was granted by one of the judges of the Supreme Court of Appeals of Virginia in which last-named Court the said writ of error is still pending undetermined.

In December, 1904, the Defendant in Error filed its second petition in said Circuit Court seeking to condemn other lands of the Plaintiff in Error for a different route between the same points, to which petition the Plaintiff in Error appeared, docketing several preliminary motions, a plea, her demurrer (found on page 24 of the record here) and her answer (found on page 26). A judgment in said proceedings was entered allowing the condemnation sought. A writ of error to said judgment was denied by the Supreme Court of Appeals of Virginia and the case is here upon a writ of error granted

by the President of said Court. These pleadings raised several questions both of right and procedure, which are thought not to be the proper subject of review by this Court, and *both* the *Demurrer* and *Answer* raised the question here to be considered, namely, the Federal Question, whether the purpose or use for which the said land was sought to be condemned was *Public* or *Private*.

This is always a JUDICIAL QUESTION, and since a taking of private property for a PRIVATE USE is a deprivation without DUE PROCESS OF LAW, is always a FEDERAL QUESTION.

See Shoemaker *vs.* U. S. 13 S. C. R. 361, 147 U. S. 282.

In Savings & Loan Assoc. *vs.* Topeka, 87 U. S. 655, B 22 L. Co-op. Ed. 461.

> "To lay with one hand, the power of the government on the property of the citizen and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes is none the less robbery because it is done under the forms of law and is called taxation."

See Chicago B. & Q. Ry. *vs.* Chicago, 166 U. S. p. 226.

And the case is to be heard and determined without any presumption attaching to the judgment of the State Court.

Township of Pine Grove *vs.* Talcott, 86 U. S. 666. Book 22, p. 227.

> "Syllabus 4. Where the question before this Court belongs to the domain of general jurisprudence, this Court is not bound by the judgment of the courts of the State where the case arose. It must hear and determine for itself."

At page 233:

> "The question before us belongs to the domain of general jurisprudence. In this class of cases this Court is not bound by the judgment of the courts of the State where the cases arise. It must hear and determine for itself."

We have to consider what constitutes a PUBLIC or a PRIVATE USE, and whether the record shows that the PURPOSES of the proposed condemnation come within the legal definition of a PUBLIC USE.

There are two striking cases upon this point, namely, Pittsburg, Wheeling and R. R. C. *vs.* Benwood Iron Works, 31 W. Va., p. 710;

2 L. R. A. 680, and Zirkle *vs.* Southern Ry. Co., 102 Va., p. 17, as construed by counsel for defendant in error.

The former holding that a switch or siding to be built to a private plant, where the primary purpose is to reach that plant, is for a private use and that "evidence that the public will have a right to use it amounts to nothing in the face of the fact that the only incentive to ask for the condemnation was private gain, and it was apparent that *the general public* had no interest in it (italics ours)" p. 690; the latter case as construed by counsel for defendant in error, holding that although the primary object is to reach the private industry, still if the said line is open to such of the public as might see fit and be able to use it, then the use was public. That the latter case expressly repudiates the former constitutes the apparent difference. The real difference being that the Zirkle case, as construed by counsel for defendant in error, holds and the Benwood case denies, that a mere technical public right, not capable of practical enjoyment, will convert an otherwise private into a public use. Counsel for plaintiff in error construing the Zirkle case in the light of St. Louis R. Co. *vs.* Petty, 20 L. R. A. 434, therein principally relied upon for its conclusions, will cheerfully challenge the measurement of the showing made in the case at bar by the doctrine of that case, but at the same time we desire in all earnestness to submit that the question to be considered here, so far as we can find, is a question of first impression before this Court, and that the authority as measured by the sounder reasoning and the safer policy is with the holding in the Benwood case.

The essence of the Benwood case is best gathered from its syllabus (5) (By the Court under the West Virginia laws) which is as follows:

5. SWITCH. Where a Railroad Corporation sought to condemn land over which to build a switch, branch road or lateral work, to reach a private manufactory, a steel mill, for the purpose of transporting freight to and from said steel mill over petitioner's road—*held:* the use to which the land was to be subjected was a private, not a "public use."

In West River Bridge Co. *vs.* Dix, 6 Howard 538, Mr. Justice Woodbury says on page 551, Book L. Co-op. Ed.:

> "Nor does even the path for the road (railroads), the easement itself, (come within the public exigency which justifies consideration), if the use of it be not public, but

merely for particular individuals and *merely in some degree* beneficial to the public. On the contrary, the uses must be for the people at large—for travelers—for all; must also be compulsory by them, and not optional with the owners; must be a right by the people, not a favor; must be under public regulations as to tolls, or owned, or subject to be owned, by the State, in order to make the corporations and object public, for a purpose like this."

(Citing 3 Kents Comm., 20; R. R. Co. *vs.* Chappell, 1 Rice 383; Memphis *vs.* Overton, 3 Yerger 53; King *vs.* Russell, 6 Barn & Cress 566; King *vs.* Ward, 4 Adol. & Ellis 384). (Parentheses and italics ours).

This is not "antiquated doctrine unfitted to modern conditions," but has been reiterated in Varner *vs.* Martin, 21 W. Va., p. 534 and Fallsburg Power Co. *vs.* Alexander, 101 Va., p. 98, and in Great Falls Ry. *vs.* Great Falls Power Co., 104 Va., p. 416.

And in Ransselaer & S. Ry. Co. *vs.* Davis, 43 N. Y. 146:

"It is difficult, as a matter of law, to define by general statement what purposes are corporate purposes, or what are the necessary purposes for which lands may, under this act, be taken, and probably the subject is incapable of exact limitation."

"It may, however, be safely asserted that the acquisition of lands * * * * * * in aid of collateral enterprises remotely connected with the running or operating of the road, although they may increase its revenue and business, are not such purposes as authorize the condemnation of private property."

See also Editorial Note, S. Chicago R. R. Co. *vs.* Dix, 17 American & English R. R. Cases 162:

"Condemnation of Land for Railroad Sidings.—

"In the early days of railroad construction, when every new road opened up wide districts to settlement and cultivation, the courts showed a strong disposition to give railroad charters a liberal construction. It was, therefore, wisely held that, in the general authority to appropriate property was included a right to take such land for side-tracks, branch roads, depots, engine-houses, ware-houses, etc., as

might be considered necessary or convenient. But the reasons that then existed have, in a measure, disappeared, as unsettled districts have become populous. Questions regarding this right are now complicated by considerations that were then of little importance. Where once land might have been taken for any of the purposes specified, without serious damage to other interests, there must now always be inconvenience, loss, or destruction to property and business as the accompaniments of railroad improvements, where the damages assessed are sometimes totally inadequate to cover the loss or can not be recovered because merely consequential. It is not surprising then that property-owners should make a vigorous protest when it is clear to their minds that the appropriation is not for public use, but for the benefit of some manufactory or other private enterprise to which a side-track would prove useful, and which would have been powerless to obtain such an improvement without the aid of a railroad."

"The question, it will be seen, is quite new and of growing importance. While its answer must depend in great measure upon the facts of the particular case, and the construction of special statutes which may be found in the legislation of most of the States, it is believed that the tendency of both legislatures and courts has been and will be towards a restriction rather than an extension of the general charter power."

Citing Baltimore & H. Turnpike Co. *vs.* Union R. R., 35 Md., 224; Rensselaer & S. R. R. *vs.* Davis, 43 N. Y. 137. See generally upon this subject, Getz's App., 3 Am. & Eng. R. R., Cas. 186; Cooley Cons. Law, 534.

Getz's App. 3d Am. & Eng. Ry. Case 195. Dissenting opinion and Editorial note 197:

"Here is the naked fact of running a siding, as it is called, across the plaintiff's lot, against their will, for private gain, to a rolling-mill. This siding is not for public use. Its terminus is on private property. If the defendant may lawfully construct it, it may arbitrarily run its siding to every private place it chooses, doing irreparable mischief

to owners of property who are in the way. In Reading, the plaintiff's dwelling and business are destroyed to-day, in laying a siding to an iron-mill; to-morrow another citizen may be ruined by a siding to an ice-house; another by one to a tannery, and so on indefinitely. Other companies have like powers as this defendant. In Philadelphia dwellings may be demolished in running sidings to sugar refineries, shoe factories, shops, and salesrooms, and other private places at the arbitrary discretion of the several boards of directors. Outside of the cities, no man's farm will be secure from a siding to any stone-quarry or other private place, whose owner may be favored by the judgment of a board of directors. I am not convinced that it was the legislative intent to grant such rights, and do not believe they have been granted. But if within the words of the statutes or charters, it seems to me a gross violation of the citizen's right, that his property should be violently taken for private use."

In Kyle *vs.* Texas & N. O. R. Co., 4 L. R. A. p. 279:

"Syllabus 2. A spur track from the line of a railroad with which it does not connect except at one point running to mills and wharfs which belong to private concerns and operated for private profit is not for a public use which will authorize the condemnation of land for a right of way."

It will be noted that this case holds that the public character of the use does not attach merely from the fact that the spur track leads to a number of private enterprises, for as was said in St. Louis M. & S. Ry. *vs.* Petty, 20 L. R. A. 439, "If the station is for the exclusive use of * * * * a *collection* of individuals *less than the public, that stamps* it as a private use (italics ours)."

The Court in Kyle *vs.* Texas etc., supra says, in its opinion, page 279, of the Gatz case supra, and the dissenting opinion:

"Judge Trunkey delivered a dissenting opinion in the Getz case and his observations are so pertinent to the facts of the present case, and so nearly in accord with our individual views of what the law should be and is, that we take the liberty of quoting his views as follows," then follows the citation above given.

St. Louis I. M. & S. Ry. *vs.* Petty, 20 L. R. A. 439:

> "A railway can not exercise the right of eminent domain to establish a private shipping station for an individual shipper. If the station is for the exclusive use of a single individual or a collection of individuals less than the public, *that stamps it* as a private use, and private property can not be taken for private use. The fact that the railway's business would be increased by additional facilities is not enough to make the use public."

In Board of Health *vs.* Van Hoessen, 14 L. R. A. 114, it has been held that condemnation proceedings can not be resorted to to take lands for the construction of spur tracks which are made for the accommodation of individual shippers. Re Niagara Falls & W. R. Co., 108 N. Y. 375, 15 N. E. p. 429. Rochester H. & L. R. Co. *vs.* Babcock, 110 N. Y. 119. Chicago E. & I. R. Co. *vs.* Wiltse, 116 Ill. 449. Pittsburg W. & K. R. Co. *vs.* Benwood Iron Works, 31 W. Va. 710. 2 L. R. A. 680.

Of the mere naked legal right in the public to the use of the land sought to be condemned three judges have said in the dissenting opinion in Kansas & T. C. R. Co. *vs.* Northwestern C. & M. Co., 51 L. R. A. 949:

> "It is also argued that whatever may be the purpose of the plaintiff in seeking to condemn its right of way over defendant's land, when its road is once built it becomes a public highway, and the plaintiff can be compelled to carry the defendant's coal on the same terms that it carries the coal of the Kansas & Texas Coal Company. True as that may be in theory courts can not pretend not to know that it is only theory. The Court should not require the defendant to submit to a wrong in the first place, with a half promise to redress his inquiry at some future time."

This after all seems to be the crucial test. If it can be said that the mere fact that the petitioner is a public service Corporation and can gather some benefit, convenience or advantage from a proposed construction and that since the State will have a right to control and regulate the proposed improvement, then this fact of itself makes the use a public use; it might just as well be said that a corporation, without the power of eminent domain, could file its petition

for condemnation and, in answer to the defence that it was without the right to condemn, could say that after condemnation it would be estopped to deny its public character, and that therefore it should be allowed to proceed. This would be a travesty upon law and constitutional rights and it would be a poor compensation to the property owner when his property was sought to be condemned, for uses in their nature private, to say to him that the State will guarantee you hereafter that you, together with the general public, may have a naked legal right to demand certain valueless privileges in connection therewith.

This was the view taken by the three dissenting judges in the Kansas & T. C. R. Co. case, supra, and it was said in substance, that the mere fact that a public service Corporation was seeking to condemn land, would not preclude an inquiry as to the real purposes of the condemnation.

Then so far as the doctrine of the Zirkle case is at variance with the foregoing cases it is respectfully submitted, that the reasoning therein contained is unsound, and should not be given the high sanction of the approval of this Court; that the Court will closely scrutinize a claim of power asserted under a statute in derogation of common right, and that the powers so asserted will be extended no further than is necessary to accomplish the real and public purpose of such enactment. In the language of Kyle *vs.* Topeka, etc., supra, "if there remains a doubt as to the extent of the power after all reasonable intendments in its favor the doubt will be solved adversely to the claim of power. And the proper limit to the power is the *reasonable necessity* of the Corporation in the discharge of its duty to the public."

It may be true that the hand of the public service Corporation is the hand of the State, and that whatever the State may condemn it may authorize its public corporate servants to condemn, but it is likewise true that the citizen has the right even as against the State to the quiet and undisturbed possession and control of his property until a disturbance of that possession and control becomes necessary by reason of some public exigency or necessity. See Great Falls *vs.* Great Falls, 104 Va. 416.

As was said in the Savings & Loan Association *vs.* Topeka, supra:

> "It must be conceded that there are such rights in any free government beyond the control of the State. A gov-

> ernment which recognizes no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true that it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted, if man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one than by many."

Counsel for the Plaintiff in Error then respectfully submit that the true doctrine is that the courts will closely scrutinize the real and and not the avowed purpose for the proposed condemnation; that the burden of showing a real public purpose is upon the petitioner; that a mere possibility of an incidental public benefit will not suffice, and especially is this true when the Court will find from the entire evidence, that the allegations of public necessity are merely colorable, and that the real and underlying motive, actuating the proceedings, is the benefit of a private individual.

This is taken to be the proper construction of the *judgment* in the Zirkle case, as it is to be presumed that the facts justified the judgment, and came within the doctrine of the principal case cited, to support the judgment of the Court. And in so far as any utterances in the opinion may be considered at variance with what was necessary to support its judgment, that the same are mere dicta, and especially is this true when such language is at variance with the conclusion of the principal case cited. The principal case cited in the Zirkle case cites with approval the doctrine of Ransselaer & S. R. Co. *vs.* Davis, supra:

> "If the station is for the exclusive use of a single individual or a collection of individuals, less than the public, that stamps it as a private use."

We may then consider that the Court will ascertain:

1st. The real motive of the condemnation, that is the ACTUAL USE to which the petition INTENDS to subject the land in question.

2d. The necessity for such ACTUAL OBJECTIVE USE, and

3d. The RIGHTS of the PUBLIC in and to the property when subjected to the ACTUAL INTENDED USER.

THE FACTS OF THIS CASE.

"Stripped of all Disguises."

> "When a suitor comes into Court and asks its aid, the Court has a right to know in what character he comes, real or fictitious." K. & T. Coal Co. *vs.* N. & W. C. Co., *supra.*

How much more is this true when that suitor comes asking to be substituted to the HIGHEST ATTRIBUTE OF A STATE'S SOVEREIGNTY.

The Defendant in Error had instituted certain condemnation proceedings for a right of way from its depot to the Factory of the Tobacco Company, under a contract with the latter—subsequently destroyed (p. 77 record). That case was and is pending in the Supreme Court of Virginia. This second proceedings was then instituted under a second contract (p. 31 record), for a line between the same points but by a different route.

It is claimed by Defendant in Error that its object is to obtain facilities for placing its cars so that access to them can be had by wagons or as expressed by the Superintendent (p. 43) "team track room" (and p. 44), and that it would not be practicable to stand the cars for this purpose on a width of less than 40 feet (p. 51). Now then we will endeavor to discover from the acts and doings of the Defendant in Error, up to the time of the institution of this proceedings, what was its *Real Purpose* and what is the possible practicable use for which the proposed right of way could be utilized.

THE REAL PURPOSE OF DEFENDANT IN ERROR.

The indicia of this purpose are found in

1st. Its abandonment of the original plan.

2d. Its contract with the Tobacco Company.

3d. The Resolution of its Board of Directors, and

4th. The instructions given to its Engineer who located the proposed line and surveyed the land sought to be condemned.

1st. The abandonment of the original plan.

The Defendant in Error had instituted proceedings to condemn a

right of way down Franklin Street where the public would have had "team access" to the proposed track, while, as it will be hereafter endeavored to show, under the new route the only *possible* access, for the public, to the second location will be through a blind roadway beside said track, seven feet wide at the blind end, twelve feet wide at the open end, for a length of five hundred (500) feet, of which over three hundred and seventy-five (375) feet would be on top of a vertical wall, varying in height from five (5) to twenty-five (25) feet, with its blind end nearest the town and its open end at a point where it would be crossed by an imaginery street; the location of said street being unknown to the Superintendent, and the Engineer of the Defendant in Error and the President of the Tobacco Company, and probably unascertainable, and indeed so doubtful that it is not known whether the entire line, as adopted by the Board of Directors, would really reach it. And this in the face of the statement of the Superintendent that forty (40) feet, less the track, or twenty-six (26) feet in the clear, was the least practicable width for that purpose (p. 51).

It can hardly be said that this indicates as an inducing motive the acquiring of "team track room" for public use.

2d. The Contract with the Tobacco Company (p. 31).

The salient provisions of this contract are:

A. The payment by the Tobacco Company of the damages to be assessed for the land condemned.

B. The right reserved to Defendant in Error to abandon the said track, should the Tobacco Company cease to continue shipments for six months, and in the event of such abandonment the agreement to reconvey to the Tobacco Company the right of way over its lands—the only possible means of access by the public to said track.

3d. The Resolution of the Directors.

This resolution (p. 30), recites as the purpose of the meeting and its own object "the condemnation or acquisition of certain property in the town of Martinsville, Henry County, Virginia, for the purpose of extending the track from or near the depot at Martinsville, Virginia, to the property of the Rucker-Witten Tobacco Company in same town," as shown by a plat exhibited to said Board, which is the map found opposite page 92 of the record.

Not a word about the condemnation or acquisition of lands for team access to said track, nor is there any evidence adduced to show that said Board had or would authorize the acquisition of land for

that purpose or the expenditure of money for the construction necessary thereto.

Condemnation for such a purpose must first be authorized by the Directors. Lewis on Eminent Domain, Sec. 307. Pierce on Railroads, p. 32. It was therefore not proper for the Superintendent to declare or assume any purpose unexpressed by said Board and there is therefore *no legal evidence of any corporate intent or purpose to subject the land in question to any other than a private use.*

4th. The Instructions given to the Engineer.

Not only does it appear that the Directors never had in mind any "team track room," but it is clearly shown that this purpose was not in the mind of the Superintendent when the survey was directed.

The Engineer, Mr. Hall, was asked—p. 61—

"Q. Don't you know, Mr. Hall, that if it had been intended to construct wider embankments than 14 feet (necessary for the track alone) you would have staked out a wider right of way on the east side rather than face the necessity of building retaining walls?

"A. Well, I know that it looks that way, but I don't know what orders Major Parker (the Superintendent) might give or what his intention might be.

"Q. You had no instructions from him in detail in reference to that?

"A. No—sir." (Parentheses ours).

If any such purpose was in the mind of the Superintendent it was concealed from the Engineer who developed the plan and from the Directors who subsequently adopted it.

Access to Fontain Street could never have been in mind for the Engineer ran his entire line and never found that street.

THE POSSIBLE PRACTICABLE USE TO WHICH THE LAND SOUGHT TO BE CONDEMNED COULD BE SUBJECTED.

Examination of the Map (at p. 92), will show that the proposed track starts opposite the depot turning to the right on a 15% curve (i. e. with a radius of 310 feet) for a distance of six hundred (600) feet, with a descending two (2) per cent. grade for five hundred (500) feet, thence on a tangent or a straight line for five hundred (500) feet on a level grade, thence on a 12 degree curve (radius 470 feet), to the left on a descending one and one-half (1½) per cent. grade

to the Rucker-Witten Tobacco Factory. The record discloses that there could be no possible access to this track until Station 3 was reached at the corner of the Alliance Ware-house and then only with the consent of the Plaintiff in Error; that the ground falls off very rapidly on the right or east side of said track, for its entire length, still the lands of Plaintiff in Error, that the proposed track was on a dangerous (p. 51) two (2) per cent. grade to Station six (6), where there would be neither cut nor fill yet on the west or town side of the center line the Engineer provided for but twelve and a half (12½) feet of right of way (p. 62); that the track would be near the surface for one hundred and twenty-five (125) feet, yet very little if any more width was provided for; that the track would then be on a fill varying from five (5) to twenty-five (25) feet in height and that the only way possible to get a roadway even as wide as twelve feet would be by building a vertical wall for said heights along the entire level five hundred (500) feet, yet the Court is asked to believe that a roadway varying in width from seven (7) to twelve (12) feet on the top of a high wall offers such advantage to the public as will justify this condemnation.

But suppose this were sufficient, is it true that the Defendant in Error is obliged and legally bound to construct such an expensive work? It is not sufficient that they might do so. The rights of the public must be fixed and unavoidable, as must the use be of obvious and substantial benefit to the public. (Folkridge Baptist Assoc. *vs.* Redd, W. Va., 10 S. E. 405 Fallsburg Case [Va.] Supra). In the language of the first case, "There must be a plain public use in view."

But suppose this were a plain public use clearly in view and of obvious benefit, where is the RIGHT of the public to access to this seven-twelve (7-12) foot boulevard; not at its south end—nor from the east, nor from the west, for these are the lands of the Plaintiff in Error. If anywhere then from the north end—over what? From Fontain Street, if it can be found, *over the lands of* the TOBACCO COMPANY and by its grace and over an extension of this high embankment. If Fontain Street is north of the Factory then the public is cut off for the reason that the extension of the line further than the Factory is unprovided for by Resolution of the Directors or by rights acquired by Defendant in Error. If Fontain Street is south of the Factory then the profile shows that its grade is at least (between Station 9 + 50 and 10 + 50) fifteen (15) feet below

the tracks (See profile on Map at p. 92) and the Defendant in Error is without power to compel the municipal authorities of the town to change that grade.

It seems therefore that neither was a public use intended nor is it possible. How then can the record be said to establish as a result of this proceedings a use fixed and vested in the public capable of practical enjoyment?

The mask removed we see but two benefits to result, one to the Defendant in Error from its increase in traffic, the other to the Tobacco Company; and for neither of these private benefits will the State lend its hand to the Defendant in Error.

It is most respectfully submitted that not only does the record fail to show such a public use as will justify the taking, but that it affirmatively shows that all the uses capable and all the benefits possible will be private and that to permit the taking of her lands under such circumstances will be a denial to the Plaintiff in Error of due process of law.

It is therefore submitted that the Circuit Court of Henry County, Virginia, erred in adjudging that the Defendant in Error had the right to condemn the lands of the Plaintiff in Error and in not deciding that the Defendant in Error was without such right, and in not deciding that the taking of such land from the Plaintiff in Error was a denial to her of Due Process of Law and that the Supreme Court of Appeals of Virginia erred in not reviewing said judgment and in not reversing the same upon the errors assigned.

Most Respectfully Submitted,

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